MICHIGAN APPEALS REPORTS

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COURT OF APPEALS

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JUDGE

JAMES ROBERT REDFORD

Judge James Robert Redford was appointed to the Court of Appeals in 2018. Prior to his appointment, he was the Director of the Michigan Veterans Affairs Agency and previously served as Governor Rick Snyder's Chief Legal Counsel from January 2015 until February 2016.

Judge Redford was a Kent County Circuit Judge from 2003 until 2015. Prior to his election to the trial bench, he was in private practice with Plunkett & Cooney and served as an Assistant United States Attorney in the U.S. Attorney's Office for the Western District of Michigan and on active duty in the United States Navy Judge Advocate General's Corps for five years. In addition to his active duty military service, he served in the Navy Reserves for twenty-three years in a variety of assignments including commanding officer of the Navy Reserve Trial Judiciary and five years as a trial judge in the Navy & Marine Corps Trial Judiciary. Judge Redford transferred to the retired-reserve list in August 2012 at the rank of Captain.

Judge Redford has been active in many Bar and community organizations. He has served on and been

chair of the Michigan Supreme Court Model Civil Jury Instructions Committee. He is a lifelong member of the Boy Scouts of America. He has also served on several nonprofit boards including the Boy Scouts of America, the Gerald R. Ford Council, and the West Michigan Shores Council of the Girl Scouts of America.

Judge Redford received his Bachelor of Science in Business Administration from John Carroll University in Cleveland, Ohio in 1982 and his Juris Doctor from the University of Detroit School of Law in 1985. Judge Redford grew up in the city of Detroit. Upon his release from active duty from the Navy, Judge Redford and his wife Dianne settled in west Michigan where they have raised their three children.

COURT OF APPEALS CASES

PUGNO v BLUE HARVEST FARMS, LLC

Docket No. 340142. Submitted September 5, 2018, at Grand Rapids. Decided September 27, 2018, at 9:00 a.m.

John and Ailene Pugno brought an action in the Ottawa Circuit Court against Blue Harvest Farms, LLC, alleging negligence and loss of consortium after a stack of pallets of unassembled cardboard boxes at Blue Harvest's warehouse fell on John, who suffered injuries as a result. John met Blue Harvest's owner, Adam LaLone, at the warehouse to inspect a malfunctioning air compressor when the accident occurred. LaLone stated that one of the pallets had been cracked and admitted that had the pallets been properly stacked, they should not have fallen; however, the pallets had not been preserved, and no photographs had been taken. Blue Harvest moved for summary disposition, arguing that the lawsuit sounded in premises liability and that because plaintiff failed to show that Blue Harvest had actual or constructive knowledge of the alleged hazardous condition, summary disposition was appropriate. The court, Jon H. Hulsing, J., denied the motion, holding that the complaint sounded only in ordinary negligence. Blue Harvest moved for reconsideration, which the court denied. However, when plaintiffs' attorney informed the court that plaintiffs were pursuing the negligence claim on theories of both premises liability and ordinary negligence, the court decided to rehear Blue Harvest's request for summary disposition on the premises liability claim. Plaintiffs' attorney invoked the theory of res ipsa loquitur and then filed an amended complaint alleging both premises liability and ordinary negligence. Before trial, Blue Harvest moved for an adjournment, claiming that because John was no longer calling his medical doctor to testify, Blue Harvest needed time to subpoena and depose John. The court denied the motion, concluding that Blue Harvest failed to file any witness list and therefore would not be prejudiced by the fact that the doctor was not going to testify at trial. At trial, the court overruled Blue Harvest's objections to plaintiffs' request for jury instructions on res ipsa loquitur and spoliation. The jury returned a verdict finding Blue Harvest liable on both negligence theories. Blue Harvest moved for a new trial,

judgment notwithstanding the verdict (JNOV), and remittitur, which the court denied. Blue Harvest appealed.

The Court of Appeals *held*:

1. There is a distinction between claims arising from ordinary negligence and claims premised on a condition of the land. When the claim is based on a condition of the premises, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land. In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A premises owner breaches its duty of care when it knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. In addition, the plaintiff must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue. In this case, the duties alleged sounded exclusively in premises liability, and plaintiffs alleged that Blue Harvest breached those duties by failing to properly stack the pallets and boxes, failing to warn of the dangers associated with the pallets and boxes, failing to make the premises safe, failing to inspect and maintain the premises to ensure that heavy boxes would not fall, and failing to otherwise protect John. All of the allegations focused on the hazardous condition; plaintiffs did not plead—and the facts did not indicate—conduct that would maintain an ordinary negligence theory. Therefore, the complaint sounded in premises liability only. Accordingly, the trial court erred when it allowed plaintiffs to proceed to trial on both a premises liability theory and an ordinary negligence theory.

2. Whether Blue Harvest breached its duty as a landowner was a question for the jury to decide because there were genuine issues of material fact as to whether Blue Harvest breached its duty of care as the premises possessor. Plaintiffs provided photographic evidence that Blue Harvest's storage practices included stacking pallets three or four high, and LaLone admitted in his deposition that properly stacked pallets would not fall. However, LaLone claimed that the incident was simply an accident likely caused by a cracked pallet. Importantly, Blue Harvest failed to preserve the pallets of cardboard that had fallen. Accordingly, the trial court did not err when it denied Blue Harvest's motion for summary disposition on plaintiffs' premises liability claim.

3. A defendant can establish its entitlement to summary disposition by demonstrating that the plaintiff failed to present sufficient evidence of notice. However, there is a difference between

the failure to discover a dangerous condition created by another and the creation of a dangerous condition by the possessor. When the possessor is the one who created the condition, knowledge of the condition is imputed to the possessor, but when the condition is created by a third person, there is a factual question regarding whether the possessor should have reasonably discovered the condition. In this case, plaintiffs and Blue Harvest both admit that LaLone created the dangerous condition at issue—the stack of pallets. Therefore, Blue Harvest's claim that it did not have notice of the condition failed because knowledge of the condition is imputed to the possessor.

4. Whether the doctrine of res ipsa loquitur can apply in a premises liability case is a question that has yet to be fully resolved in Michigan. The Michigan Supreme Court has relied on the Second Restatement of Torts to determine that res ipsa loquitur does not apply to cases involving gross negligence; however, the Restatement does not expressly preclude the use of a res ipsa loquitur theory with premises liability claims. Accordingly, the doctrine of res ipsa loquitur may apply to premises liability claims.

5. In order to avail themselves of the doctrine of res ipsa loquitur, plaintiffs must meet the following conditions: (1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff, and (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. A plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event. In this case, both parties agree that LaLone stacked the pallets. Moreover, the trial testimony revealed that Blue Harvest did not implement any safety precautions that could have prevented this type of accident. Plaintiffs' expert testified that Blue Harvest's storage procedures fell below the industry standard. Additionally, Blue Harvest failed to preserve the one piece of evidence—the wooden pallets—that could have provided an answer to the ultimate question of why the pallets fell. Given the spoliation instruction provided, the jury could reasonably determine, beyond mere speculation, that the improper stacking and storing of the pallets was the likely cause of the injury. Thus, in consideration of this evidence, a jury could conclude that the event here would not be something that occurs absent someone's negligence. The trial court did not err, particularly given the

spoliation of evidence, when it allowed the jury to determine whether the falling pallets were an event that ordinarily does not happen in the absence of negligence. The final three elements of res ipsa loquitur were also established: Blue Harvest was in exclusive control of the premises, John was in no way responsible for the event, and Blue Harvest had ready access to any evidence of the true explanation of the event's happening. Under the unique circumstances of this case, the trial court did not err when it provided the jury instruction on res ipsa loquitur.

6. The imposition of a sanction for spoliation of evidence may be disturbed only upon a finding that there has been a clear abuse of discretion. An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. In this case, the trial court provided the jury with M Civ JI 6.01(c), which stated that the jury was permitted to infer that the evidence would have been adverse to Blue Harvest if the jury believed that no reasonable excuse for Blue Harvest's failure to produce the evidence had been shown. Blue Harvest's failure to preserve the pallets deprived plaintiffs of the opportunity to inspect a possible cause of the collapse. As a result, the trial court did not abuse its discretion by providing the spoliation instruction because it merely permitted the jury to infer that the evidence would have been adverse to Blue Harvest if the jury did not believe that Blue Harvest's excuse for disposing of the pallets was reasonable. Accordingly, the trial court did not err when it provided the spoliation instruction to the jury. Additionally, the trial court did not err when it refused to provide to the jury two supplemental instructions that Blue Harvest had requested; the instructions that the court had already provided to the jury properly instructed the jury, and therefore Blue Harvest was not entitled to a new trial.

7. A trial court's ruling on a motion to adjourn is reviewed for an abuse of discretion. A trial court properly denies a motion for adjournment in cases that involve some combination of numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant. In this case, at the motion hearing regarding Blue Harvest's motion to adjourn trial, the trial court explained that Blue Harvest failed to prepare a witness list and did not indicate that it was relying on plaintiff's witness list. In addition, Blue Harvest had access to the doctor's medical records, and it could have subpoenaed the doctor to appear at trial. The trial court concluded that Blue Harvest could not claim prejudice for not having the opportunity to cross-examine a witness who was not testifying at trial. Accordingly,

the trial court did not abuse its discretion by denying Blue Harvest's motion for an adjournment.

8. The trial court properly denied Blue Harvest's motion for JNOV or remittitur because there was evidence supporting the jury's wage-loss award. Although John was medically cleared to return to work in February 2015, he testified at trial that he was unable both mentally and physically to return to work. In addition, he testified that he only accepted a retirement package because he was injured and that he originally planned to work until he was 66 years old. The jury was entitled to believe him.

Affirmed.

TORTS — NEGLIGENCE — PLEADING — PREMISES LIABILITY — ASSERTION OF RES IPSA LOQUITUR.

A party may assert the doctrine of res ipsa loquitur in negligence actions based on premises liability.

Rhoades McKee PC (by *Stephen J. Hulst*) for plaintiffs.

Secrest Wardle (by *Drew W. Broaddus*) for defendant.

Before: MURRAY, C.J., and CAMERON and LETICA, JJ.

CAMERON, J. In this negligence case, a jury awarded a total judgment of $358,288.98 in favor of plaintiffs, John and Ailene Pugno.[1] Defendant, Blue Harvest Farms, LLC, appeals the trial court's order denying its motion for a new trial, judgment notwithstanding the verdict (JNOV), and remittitur. On appeal, Blue Harvest raises multiple allegations of error originating from the trial court's denial of Blue Harvest's motion for summary disposition under MCR 2.116(C)(10) and from its motion for a new trial, JNOV, and remittitur. We conclude that the trial court erred when it allowed

[1] This case arises out of injuries suffered by John. Ailene's claims were based on loss of consortium. As a result, we will refer to John as "plaintiff."

plaintiff to proceed to trial on both a premises liability and an ordinary negligence theory. However, it was permissible to proceed on the premises liability theory, the jury instructions on res ipsa loquitur and spoliation as to premises liability were proper, and it was appropriate for the jury to find Blue Harvest liable on the premises liability claim. Therefore, a new trial is not merited. In all other respects, we affirm.

I

Plaintiff was employed by Air Components, Inc., as an air-compressor technician and salesperson. Blue Harvest is a family-owned blueberry farm and packaging facility located in West Olive, Michigan. On October 28, 2014, plaintiff met with Blue Harvest's owner, Adam LaLone, to inspect a malfunctioning air compressor on Blue Harvest's premises. As plaintiff and LaLone walked through the warehouse where packaging materials were stored, they passed a stack of three pallets of unassembled cardboard boxes near the walkway. The top two bundles unexpectedly fell on them. Plaintiff suffered multiple injuries, including a broken hip that required emergency hip replacement surgery.

Blue Harvest did not preserve the pallets or cardboard boxes that fell, nor were there any photographs taken. According to LaLone, each pallet of stacked cardboard was four feet long and four feet high. Each stack of cardboard was bound to a wooden pallet with nylon straps and was delivered to Blue Harvest by an outside vendor. A week before the incident, LaLone used a forklift to move the bound pallets of cardboard in the warehouse and stacked them three bundles high. Together, the tower of cardboard weighed 1,000 pounds and reached a height of 14 feet. LaLone testified at his deposition that stacking cardboard in this

manner was normal in the industry. He had worked on farms that had used that method of storage for 50 years without incident. Importantly, he admitted that if the cardboard was properly stacked, it should not "go anywhere," but he did not know what happened to cause the cardboard to fall. After the incident, LaLone noted that one of the pallets that fell was cracked. However, he was unsure whether the crack was on the back side or the front side of the pallet because "[e]verything was flipped over." LaLone opined that the incident may have been caused by a damaged pallet; however, there was no indication whether the pallet was cracked before the incident because the cardboard obscured the view of the pallet. Unfortunately, LaLone used the remaining undamaged boxes after the incident and threw away the cracked pallet before plaintiff could inspect it.

II

Plaintiff filed a two-count complaint against Blue Harvest on June 20, 2016, alleging negligence and loss of consortium. Blue Harvest moved for summary disposition under MCR 2.116(C)(10), arguing that the lawsuit sounded in premises liability and that because plaintiff failed to show that Blue Harvest had actual or constructive knowledge of the alleged hazardous condition, summary disposition was appropriate. The trial court entered an order denying Blue Harvest's motion for summary disposition without the benefit of oral argument, holding that plaintiff's complaint sounded only in ordinary negligence and that "[d]efendant's motion argues against a legal theory which has not been pled." Blue Harvest moved for reconsideration, arguing that the trial court committed palpable error because plaintiff's claim was based exclusively on

premises liability—not ordinary negligence. The trial court denied Blue Harvest's motion, citing its earlier order denying the motion for summary disposition.

At a later proceeding, plaintiff's attorney surprised the court when he informed it that plaintiff was pursuing his negligence claim on both a premises liability and an ordinary negligence theory. The trial court decided to rehear Blue Harvest's request for summary disposition on plaintiff's premises liability claim. At the hearing, Blue Harvest argued that summary disposition was proper because there was no genuine issue of material fact that Blue Harvest did not have actual or constructive notice of the hazardous condition. Blue Harvest further argued that there was no evidence of negligence at all because plaintiff presented no evidence explaining why the pallet fell, e.g., LaLone stacking the pallets improperly, a pallet cracking under the weight of the cardboard, or the vibrations of forklift activity nearby causing the pallets to shift off balance. Plaintiff's attorney referred to the theory of res ipsa loquitur, explaining that such an instruction was needed for the very reason that there was no evidence as to why the pallets fell. Plaintiff's attorney also addressed the fact that he was alleging two separate negligence theories:

> [*Plaintiff's Attorney*]: But in terms of the premises liability claim, we have to separate conduct, which is negligence, from what is your duty as a landowner? And we cited the law that says you can have both claims. We have the conduct. [LaLone] clearly stacked it. There's no dispute on that.
>
> *The Court*: Why have you made your complaint so, I guess, simple yet complicated because you're alleging a couple theories on a simple complaint.
>
> [*Plaintiff's Attorney*]: I –

> *The Court*: This is difficult.
>
> [*Plaintiff's Attorney*]: And I can tell you why. Because we didn't even know. Because we knew it fell over. We didn't know about the cracked pallets. My client was in the hospital when all this was cleaned up. So, we're coming in saying we know something happened here, something went wrong, and now I need to discover it. . . .
>
> *The Court*: What you need to do is to file an amended complaint putting forth your theories, and then once we get that, we'll determine if they're prepared to go to trial on your amended complaint or not.

Plaintiff's attorney filed an amended complaint a few days later, alleging premises liability and ordinary negligence. Blue Harvest did not file another motion for summary disposition,[2] and the trial court never addressed whether plaintiff could continue on both negligence theories. Before trial, Blue Harvest filed an emergency motion for an adjournment, claiming that plaintiff was no longer calling his treating medical doctor to testify and, therefore, Blue Harvest needed time to subpoena and depose him. The trial court denied the motion, concluding that Blue Harvest failed to file any witness list and therefore would not be prejudiced by the fact that the doctor was not going to testify at trial. Trial commenced on June 14, 2017. Before closing arguments, the trial court overruled Blue Harvest's objections to plaintiff's request for jury instructions on res ipsa loquitur and spoliation. The trial court also denied Blue Harvest's request for two other specific jury instructions. The jury returned a verdict finding Blue Harvest liable on both negligence

[2] According to the scheduling order, motions for summary disposition had to be filed within 28 days of trial. Plaintiff's amended complaint was filed on May 23, 2017—22 days before trial was scheduled to begin on June 14, 2017. Therefore, it is uncertain whether defendant could have filed a motion for summary disposition absent a trial adjournment.

theories. Blue Harvest then moved for a new trial, JNOV, and remittitur, claiming that the trial court failed to grant its emergency motion for an adjournment, that it erred when it allowed the instructions on res ipsa loquitur and spoliation, that it erred when it denied Blue Harvest's request for specific jury instructions, and that remittitur was necessary because the jury failed to account for the fact that plaintiff was cleared to go back to work.

III

Blue Harvest first argues that the trial court erred by denying its motion for summary disposition because plaintiff's claim sounded exclusively in premises liability, there was no genuine issue of material fact for a jury to decide the premises liability issue, and the trial court should not have allowed the claim to proceed on the basis of res ipsa loquitur because the doctrine is inapplicable to premises liability claims. While we agree that plaintiff's claim sounded exclusively in premises liability, we are unpersuaded by Blue Harvest's remaining arguments.

A

An issue is preserved for appellate review when it is raised in and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In this case, Blue Harvest moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim was based on premises liability and that plaintiff failed to produce any evidence that Blue Harvest was negligent. The trial court denied Blue Harvest's motion as it pertained to premises liability, concluding that Blue Harvest was not entitled to summary disposition for an apparent lack of actual or constructive notice

because LaLone created the hazardous condition and notice was imputed to Blue Harvest. Therefore, Blue Harvest's argument that it is entitled to summary disposition in relation to plaintiff's premises liability claim is preserved. However, it is less clear whether Blue Harvest has preserved its argument that plaintiff's ordinary negligence theory should have been summarily dismissed. While Blue Harvest alleged in its motion for summary disposition that plaintiff's claim sounds in premises liability, it did not argue in its brief or at the hearing that the ordinary negligence claim should be dismissed because plaintiff's lawsuit sounds *exclusively* in premises liability. On the other hand, Blue Harvest did raise this argument in its motion for reconsideration, and the trial court denied the motion without holding a hearing. Regardless, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We choose to do so here because this is an issue involving a question of law for which all relevant facts are part of the record. See *id*.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002). When reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court "must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). This Court's "task is to review the record evidence, and all reason-

able inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial." *Id*. A genuine issue of material fact exists when the record, "giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (quotation marks and citation omitted). However, the court may not "assess credibility" or "determine facts" on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

B

There is no dispute that plaintiff was an invitee at Blue Harvest's warehouse. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000) (stating that "invitee status is commonly afforded to persons entering upon the property of another for business purposes"). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "A premises owner breaches its duty of care when it knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8; 890 NW2d 344 (2016) (quotation marks and citation omitted). In addition, the plaintiff "must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue." *Id*. (quotation marks and citation omitted).

Blue Harvest argues persuasively that the trial court erred when it allowed plaintiff's claim to proceed on theories of both premises liability and ordinary negligence. "Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). Instead, an action should be determined by reading the entire complaint, looking beyond procedural labels, and determining the exact nature of the claim. *Id*. at 691-692. Importantly, there is a distinction "between claims arising from ordinary negligence and claims premised on a condition of the land." *Id*. at 692. When the claim is based on a condition of the premises, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id*.; see also *Kachudas v Invaders Self Auto Wash*, 486 Mich 913, 914 (2010) ("[T]he plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability.").

Much of the confusion in this case stemmed from plaintiff's original complaint, which alleged a single claim of "negligence." Even plaintiff's amended complaint, which alleged both negligence theories, listed similar allegations under each count. On review of the original and amended complaints, it is clear that the duties alleged sound exclusively in premises liability. In the original complaint, plaintiff claimed that Blue Harvest, as the owner of the premises, owed him the "highest level of protection": to warn of any dangers it should have known about, to make the premises safe for plaintiff, to maintain the premises in a safe manner, and to ensure that it employed methods to store pallets safely to protect plaintiff from falling objects. According to plaintiff, Blue Harvest breached its duty by failing to properly stack the pallets and boxes, failing to warn of the dangers associated with the

pallets and boxes, failing to make the premises safe, failing to inspect and maintain the premises to ensure that heavy boxes would not fall, and failing to otherwise protect plaintiff. In the amended complaint filed weeks before trial, plaintiff included both negligence theories. Under the count for ordinary negligence, plaintiff alleged that Blue Harvest failed to properly stack the pallets and keep them from falling, failed to ensure that the stack would not fall over, and stacked the pallets to an unsafe height using defective pallets. All of plaintiff's allegations focus on the hazardous condition, Blue Harvest's duty to protect plaintiff from the hazardous condition, or how Blue Harvest created the condition. These allegations relate to the condition of the premises, i.e., the stack of pallets, and the complaint sounds in premises liability only. Therefore, we conclude that the trial court erred when it allowed plaintiff to proceed to trial on both theories.

That is not to say a plaintiff can never proceed on both negligence theories. However, in this case, plaintiff has not pleaded—nor do the facts provide—a basis that would maintain a theory of ordinary negligence. This Court has stated:

> In a negligence case, the theory of liability determines the nature of the duty owed . . . . In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct, as in this case. [*Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005) (opinion by NEFF, J.).]

In *Laier*, this Court reversed the trial court's grant of summary disposition and remanded for further proceedings. *Id*. at 500-501. Judge NEFF, authoring the lead opinion, concluded that the plaintiff had alleged

both a premises liability claim and an ordinary negligence claim, stating that the "[d]efendant's *conduct* was . . . an alleged basis of liability, independent of premises liability." *Id*. at 493. The plaintiff's decedent in *Laier* died after he was crushed by the front-end loader bucket of the defendant's tractor when he and the defendant attempted to fix a hydraulic hose. *Id*. at 485-486. The plaintiff alleged that the defendant was negligent in the operation and control of the tractor and bucket. *Id*. at 486. Judge NEFF also determined that the defendant failed to secure the bucket of the tractor in a raised position just before the decedent stepped under the bucket to work on the hose. *Id*. at 495. Accordingly, the defendant's duty to operate the tractor in a safe manner constituted conduct sufficient to maintain an ordinary negligence claim, and the defendant's duty to protect the decedent from unreasonable risks of injury and to warn of those risks as they pertained to the tractor as a condition of the premises was sufficient to maintain a premises liability claim. *Id*. at 495, 497. The concurring judges, in two separate opinions, came to the conclusion that more factual development was needed to determine whether an ordinary negligence claim was viable. *Id*. at 501-502 (SCHUETTE, J., concurring in the result only); *id*. at 502-504 (HOEKSTRA, P.J., concurring in part and dissenting in part).[3]

In this case, plaintiff does not allege an ordinary negligence claim that is "grounded on an independent theory of liability based on the defendant's con-

[3] Notably, Judge HOEKSTRA would have further concluded that summary disposition was proper on the premises liability claim because the tractor presented no danger until the defendant lifted the bucket. *Laier*, 266 Mich App at 503 (HOEKSTRA, P.J., concurring in part and dissenting in part). Additionally, the defendant was in no better position to protect the plaintiff's decedent from the dangerous condition than the decedent himself. *Id*.

duct . . . ." *Id*. at 493 (opinion by NEFF, J.). Instead, plaintiff only alleges that Blue Harvest, a week before the incident, created the dangerous condition, i.e., the stacked pallets, and failed to maintain the pallets in a safe manner. An action sounds in premises liability rather than ordinary negligence "even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis*, 296 Mich App at 692. There is no allegation that LaLone or one of Blue Harvest's employees actively knocked the pallets over or engaged in direct conduct that caused the pallets to fall onto plaintiff. LaLone was not actively stacking the pallets when they fell. The pallets had been stacked in that manner nearly a week earlier and were simply a condition of the premises. Claims that Blue Harvest failed to protect and warn plaintiff of the unreasonable risks of injury sound squarely in premises liability. Because plaintiff did not plead sufficient allegations supporting ordinary negligence, the trial court erred when it allowed plaintiff to proceed on that theory.

Blue Harvest, however, would be entitled to a new trial only if refusal to set aside the verdict would be inconsistent with substantial justice. MCR 2.613(A); *Guerrero v Smith*, 280 Mich App 647, 655-656; 761 NW2d 723 (2008). If the trial court did not err by allowing plaintiff to proceed on the premises liability theory, and if the jury received the proper jury instructions regarding that claim, then any error involving the ordinary negligence claim would not have affected the integrity of the jury's verdict and would be harmless. MCR 2.613(A).

C

We must next determine whether plaintiff's premises liability claim survives summary disposition.

Upon review of the record, we conclude that the trial court did not err when it denied Blue Harvest's motion for summary disposition on plaintiff's premises liability claim. Blue Harvest argues that it is entitled to summary disposition because there was no evidence that the pallets were stacked improperly and because no one knows why the stack of pallets fell over. Thus, Blue Harvest argues, even when viewing the evidence in the light most favorable to plaintiff, no jury could find Blue Harvest liable. This argument fails.

As stated previously, a premises owner has a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo*, 464 Mich at 516. The premises owner breaches this duty "when it knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Lowrey*, 500 Mich at 8 (quotation marks and citation omitted). Plaintiff provided photographic evidence that Blue Harvest's storage practices included stacking pallets three or four high. Blue Harvest's owner, LaLone, admitted in his deposition that properly stacked pallets would not fall—implying pallets that fall could be improperly stacked. There was evidence that LaLone led plaintiff in close proximity of the pallets as they walked through the warehouse. And importantly, Blue Harvest failed to preserve the pallets of cardboard that had fallen. As provided in more detail later, plaintiff was entitled to an inference in his favor because of the spoliation of evidence. Thus, considering the evidence in the light most favorable to the nonmoving party, plaintiff presented sufficient evidence, albeit circumstantial, to prove that Blue Harvest failed to protect and warn plaintiff from an unreasonable risk of harm on the

premises. On the other hand, LaLone claimed that the incident was simply an accident likely caused by a cracked pallet and Blue Harvest was in no way negligent. Thus, whether Blue Harvest breached its duty as a landowner is a question for the jury to decide. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995) ("If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide."). There are genuine issues of material fact as to whether Blue Harvest breached its duty of care as the premises possessor, and summary disposition is not appropriate on this issue.

A defendant can also "establish its entitlement to summary disposition by demonstrating that plaintiff failed to present sufficient evidence of notice." *Lowrey*, 500 Mich at 10. To avoid summary disposition on this ground, a plaintiff must "prove that the premises possessor had actual or constructive notice of the dangerous condition at issue." *Id*. at 8 (quotation marks and citation omitted). However, "there is a difference between the failure to discover a dangerous condition created by another, and the creation of a dangerous condition by the possessor." *Pippin v Atallah*, 245 Mich App 136, 146 n 2; 626 NW2d 911 (2001). "Where the possessor is the one who created the condition, knowledge of the condition is imputed to the possessor, but where the condition is created by a third person, there is a factual question regarding whether the possessor should have reasonably discovered the condition." *Id*.; see also *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991) (concluding that notice is unnecessary when the defendant's agents created the condition). In this case, plaintiff and Blue Harvest both admit that LaLone created the dangerous condition at issue—the stack of pallets. Therefore, Blue Harvest's

claim that it did not have notice of the condition fails because knowledge of the condition is imputed to the possessor.

IV

Next, Blue Harvest argues that the trial court erred when it allowed the res ipsa loquitur jury instruction on a premises liability theory of negligence. We disagree. The issue of whether the doctrine of res ipsa loquitur is applicable to a particular case is a question of law. *Jones v Porretta*, 428 Mich 132, 154 n 8; 405 NW2d 863 (1987).

"The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act. . . ." *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) (quotation marks and citation omitted; ellipsis in original). It is not an independent cause of action. Our Supreme Court has provided the following standard:

> In order to avail themselves of the doctrine of res ipsa loquitur, plaintiffs must meet the following conditions:
>
> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
>
> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Id*. (quotation marks, citation, and alterations omitted).]

Although plaintiff must establish that the event was of a kind that ordinarily does not occur in the absence of

negligence, plaintiff must also produce some evidence of wrongdoing beyond the mere happening of the event. *Fuller v Wurzburg Dry Goods Co*, 192 Mich 447, 448; 158 NW 1026 (1916).

The trial court provided the following jury instruction at the close of trial:

> If you find that the defendant had control over the instrumentality which caused the plaintiff's injuries and the event, the falling of the pallets, is of a kind which ordinarily does not occur in the absence of someone's negligence and the event, the falling of the pallets, was not due to any voluntary action or contribution on the part of the plaintiff and that the evidence of the true explanation of the event, the falling of the pallets, must be more readily accessible to the defendant than the plaintiff, then you may infer that the defendant was negligent.

First and foremost, whether the doctrine of res ipsa loquitur can apply in a premises liability case is a question that has yet to be fully resolved. Blue Harvest argues that this Court should not adopt the doctrine in this state, citing Alabama law, see *Ex parte Harold L Martin Distrib Co, Inc*, 769 So 2d 313, 314 (Ala, 2000), and arguing that our courts have predominantly applied res ipsa loquitur in the context of medical malpractice claims.[4] We decline to adopt Blue Harvest's ap-

[4] We note that this Court has ruled on, albeit in a cursory manner, at least three cases that allowed the use of res ipsa loquitur in a premises liability case. See *Owens Estate v Mantha Mgt Group, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 28, 2018 (Docket No. 338392); *Cooper-James v Texas Roadhouse of Roseville*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2010 (Docket No. 293797); *Boyer v Target Corp*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2005 (Docket No. 251790). The United States Court of Appeals for the Sixth Circuit, applying Michigan law, has also applied res ipsa loquitur to a premises liability claim. See *DeBusscher v Sam's East, Inc*, 505 F3d 475, 480-481 (CA 6, 2007).

proach. Our Supreme Court has relied on the Second Restatement of Torts to determine that res ipsa loquitur does not apply to cases involving gross negligence, see *Maiden v Rozwood*, 461 Mich 109, 127; 597 NW2d 817 (1999), citing 2 Restatement Torts, 2d, § 328D, comment *j*, pp 163-164, and we find the Restatement instructive. Importantly, the Restatement does not expressly preclude the use of a res ipsa loquitur theory with premises liability claims as it does for gross negligence claims. Instead, the Restatement provides examples of when res ipsa loquitur applies to premises liability-type cases, such as when plaster unexpectedly falls from the ceiling, when a sign falls from a building, or when a chandelier falls from its fixture. See generally Restatement, § 328D, illustrations. Ultimately, res ipsa loquitur is "merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." Restatement, § 328D, comment *b*, p 157. Premises liability is a theory of negligence, and therefore, we conclude that the doctrine of res ipsa loquitur may apply to premises liability claims.

Turning to the first element of res ipsa loquitur, we must ask whether "the event [is] of a kind which ordinarily does not occur in the absence of someone's negligence." *Woodard*, 473 Mich at 7 (quotation marks and citation omitted). The Second Restatement of Torts provides the following guidance on this element:

> *e*. *Permissible conclusion*. The plaintiff's burden of proof (see § 328A) requires him to produce evidence which will permit the conclusion that it is more likely than not that his injuries were caused by the defendant's negligence. Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof.

> The plaintiff need not, however, conclusively exclude all other possible explanations, and so prove his case beyond a reasonable doubt. Such proof is not required in civil actions, in contrast to criminal cases. It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. This conclusion is not for the court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so. [Restatement, § 328D, comment *e*, p 159.]

The evidence is clear that Blue Harvest's owner, LaLone, stacked the pallets of cardboard. Plaintiff and the trial court both rely on LaLone's testimony that a properly stacked pallet should not fall, leading to the reasonable inference that a falling pallet does so because it was improperly stacked. Moreover, the trial testimony is clear that Blue Harvest did not implement any safety precautions that could have prevented this type of accident. According to plaintiff's expert engineer who testified at trial,[5] the higher pallets are stacked, the more likely they are to fall over and injure someone. In this case, plaintiff's expert concluded that Blue Harvest's storage procedures, including stacking cardboard pallets three high, fell below the industry standard. Most importantly, Blue Harvest failed to preserve the one piece of evidence—the wooden pallets—that could have provided an answer to the ultimate question of why the pallets fell. Given the spoliation instruction provided, the jury could reasonably determine, beyond mere speculation, that the improper stacking and storing of the pallets was the likely cause of the injury. Thus, in consideration of this evidence, a jury could conclude that the event here would not be

[5] We note that plaintiff's expert testified only at trial, and his findings were not part of the record at the time of the hearing on defendant's motion for summary disposition under MCR 2.116(C)(10).

something that occurs absent someone's negligence. That said, Blue Harvest has posited another viable theory—one that does not involve negligence at all. It claims that the pallets were properly stacked, but one pallet was cracked and therefore was the likely cause of the incident. We acknowledge that this is a plausible theory. The pallet could have been compromised when it was delivered to the warehouse or at the time it was stacked. Alternatively, the weight of the cardboard could have caused the defect in the pallet and shifted the stack off balance. However, when "the facts proved reasonably permit the conclusion that negligence is the more probable explanation," this decision must be left to the jury. *Id*. The trial court did not err, particularly given the spoliation of evidence, when it allowed the jury to determine whether the falling pallets were an event that ordinarily does not happen in the absence of negligence.

The last three elements of res ipsa loquitur are also established. The evidence shows that Blue Harvest was in exclusive control of the premises, that plaintiff was in no way responsible for the event, and that Blue Harvest had ready access to any evidence of the true explanation of the event's happening. *Woodard*, 473 Mich at 7. Blue Harvest claims that the vendors also had control of the pallets, but LaLone testified that the pallets had been at the warehouse for almost a week before the event occurred. Therefore, this argument is without merit. Under the unique circumstances of this case, the trial court did not err when it provided the jury instruction on res ipsa loquitur.

V

Next, as intimated earlier, we must determine whether the trial court's spoliation instruction was

appropriate as a sanction because Blue Harvest disposed of the pallets and boxes that fell on plaintiff. We conclude that the spoliation instruction was proper.

The imposition of a sanction for spoliation of evidence "may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). In addition, this Court reviews "the trial court's decision regarding supplemental jury instructions" for an abuse of discretion. *Guerrero*, 280 Mich App at 660. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 306 Mich App 203, 208; 854 NW2d 744 (2014).

An adverse inference permits the fact-finder to conclude that the missing evidence would have been adverse to the opposing party. *Brenner*, 226 Mich App at 155-156.

> A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party. [*Ward v Consol Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005).]

In this case, the trial court provided M Civ JI 6.01(c) to the jury:

> The defendant in this case has not offered the pallets which fell on plaintiff as evidence. As this evidence was under the control of the defendant and could have been produced by the defendant, you may infer that the evidence would have been adverse to the defendant if you

> believe that no reasonable excuse for defendant's failure to produce the evidence has been shown.

The evidence was undisputed that Blue Harvest had control over the pallets that fell on plaintiff. They were located in Blue Harvest's warehouse. In addition, these items were relevant to this case. In fact, Blue Harvest's owner testified at trial that he believed that the incident was caused by failure of one of the pallets. Blue Harvest also argued that plaintiff's injuries were the result of an accident and that no one knew why the pallets fell.

"Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Brenner*, 226 Mich App at 162. Blue Harvest's failure to preserve the pallets deprived plaintiff of the opportunity to inspect a possible cause of the collapse. As a result, the trial court did not abuse its discretion by providing the spoliation instruction because it merely permitted the jury to infer that the evidence would have been adverse to Blue Harvest if the jury did not believe that Blue Harvest's excuse for disposing of the pallets was reasonable. See *id*. at 159-160. The trial court did not err when it provided the spoliation instruction to the jury.

Blue Harvest also contends that the trial court erred by not providing two supplemental instructions for the jury.

First, Blue Harvest asked the trial court to provide the following instruction: "[T]he happening of an accident in and of itself is not evidence of negligence." The trial court declined to do so, stating that the res ipsa loquitur instruction already covered that information. The instruction provided that the jury could infer

negligence on the part of Blue Harvest if it found that Blue Harvest had control over the pallets, that the falling of the pallets was the kind of event that does not ordinarily occur in the absence of someone's negligence, that the falling of the pallets was not due to any voluntary action on the part of plaintiff, and that the evidence of the true explanation of the event was more accessible to Blue Harvest than plaintiff. See *Woodard*, 473 Mich at 7. Thus, the jury had to find that the four elements of res ipsa loquitur were met before inferring negligence in this case. Accordingly, the instruction that Blue Harvest asked the trial court to provide—"the happening of an accident in and of itself is not evidence of negligence"—was properly covered by the res ipsa loquitur instruction. See *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.") (quotation marks and citation omitted).

Finally, Blue Harvest requested the trial court to instruct the jury that "speculation and conjecture are insufficient to create an issue of material fact as to whether negligence can be proven." The trial court offered a similar preliminary instruction in regard to damages: "Which, if any, of these elements of damage have been proved, it is for you to decide based upon evidence and not upon speculation, guess, or conjecture." See M Civ JI 50.01. In addition, the trial court provided: "Your determination of the facts in this case must be based only upon the evidence admitted during the trial. Evidence consists of the sworn testimony of the witnesses. It also includes exhibits, which are documents or other things introduced into evidence." See M Civ JI 2.04(1). The trial court also provided M Civ JI 2.06(1), which states:

> Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

On the basis of the foregoing, the jury was properly instructed that its verdict must be based on the evidence presented at trial. See *Zaremba Equip, Inc*, 302 Mich App at 25. As a result, the jury was properly instructed, and Blue Harvest is not entitled to a new trial. *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). See also *Guerrero*, 280 Mich App at 665 ("Because the court's instructions properly covered the relevant areas, the trial court did not err by declining to give [the] plaintiff's second and third requested supplemental jury instructions.").

VI

Next, Blue Harvest contends that it is entitled to a new trial because the trial court denied its emergency motion to adjourn right before trial to allow it to secure the testimony of plaintiff's primary care doctor. We disagree.

A trial court's ruling on a motion to adjourn is reviewed for an abuse of discretion. *Woodard*, 473 Mich at 12 (CAVANAGH, J., concurring in part and dissenting in part). "An abuse of discretion occurs when the

decision results in an outcome falling outside the range of principled outcomes." *Ronnisch Constr Group, Inc*, 306 Mich App at 208.

"A motion for an adjournment must be based on good cause . . . ." *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). Pursuant to MCR 2.503(C):

> (1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.
>
> (2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.
>
> (3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary.

A trial court properly denies a motion for adjournment in cases that involve "some combination of numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992).

In this case, at the motion hearing regarding Blue Harvest's motion to adjourn trial, the trial court explained that Blue Harvest failed to prepare a witness list and did not indicate that it was relying on plaintiff's witness list. In addition, Blue Harvest had access to the doctor's medical records, and it could have subpoenaed the doctor to appear at trial. The trial court concluded that Blue Harvest could not claim prejudice for not having the opportunity to cross-examine a witness who was not testifying at trial (because plaintiff no longer planned to have him testify

and Blue Harvest did not submit a witness list). Ultimately, the trial court determined that Blue Harvest created its own problem by not preparing a witness list and that there were other means by which the evidence could be presented (medical records). Therefore, the trial court denied Blue Harvest's motion for an adjournment.

On the basis of the foregoing, the trial court did not abuse its discretion by denying Blue Harvest's motion for an adjournment. See *Woodard*, 473 Mich at 12 (CAVANAGH, J., concurring in part and dissenting in part). Although this was its first motion to adjourn, Blue Harvest failed to exercise due diligence and neglected to provide a witness list. See *Tisbury*, 194 Mich App at 20. Further, Blue Harvest has not established that it suffered any injustice as a result of the trial court's denial because it had the medical records and plaintiff did not call the doctor to testify; therefore, Blue Harvest was not denied the opportunity to cross-examine a witness who testified at trial. See *id*. As a result, the trial court did not abuse its discretion by denying Blue Harvest's motion for an emergency adjournment.

VII

Lastly, Blue Harvest asserts that it was entitled to partial JNOV or remittitur because the jury awarded $100,000 in lost wages even though plaintiff was medically cleared to return to work and accepted a retirement package from his employer. We disagree.

This Court reviews a trial court's decision to deny a motion for JNOV de novo. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999). This Court will "view all legitimate inferences from the evidence in the light most favor-

able to" the nonmoving party. *Id*. "Only if the evidence so viewed fails to establish a claim as a matter of law is JNOV appropriate." *Id*.

"This Court reviews a trial court's decision to deny a motion for remittitur for an abuse of discretion." *Diamond v Witherspoon*, 265 Mich App 673, 692; 696 NW2d 770 (2005). "When reviewing a trial court's decision regarding remittitur, this Court must view the evidence in the light most favorable to the nonmoving party." *Id*. at 693.

Although plaintiff was medically cleared to return to work by his hip surgeon in February 2015, he testified at trial that he was unable both mentally and physically to return to work. In addition, he testified that he only accepted a retirement package because he was injured and that he originally planned to work until he was 66 years old (about two additional years). The jury was entitled to believe him. See *Guerrero*, 280 Mich App at 669 ("It is the jury's responsibility to determine the credibility and weight of the trial testimony."). Further, plaintiff submitted evidence showing that his yearly income averaged about $100,000 before he was injured. Thus, viewing the evidence in a light most favorable to plaintiff, there was evidence supporting the jury's $100,000 wage-loss award, and the trial court properly denied Blue Harvest's motion for JNOV or remittitur. See *Diamond*, 265 Mich App at 692; *Badalamenti*, 237 Mich App at 284.

Affirmed.

MURRAY, C.J., and LETICA, J., concurred with CAMERON, J.

DAYSTAR SELLER FINANCING, LLC v HUNDLEY

Docket No. 339467. Submitted September 6, 2018, at Grand Rapids. Decided September 27, 2018, at 9:05 a.m. Leave to appeal denied 504 Mich 881 (2019).

Daystar Seller Financing, LLC, brought an action in the Ottawa Circuit Court against Patrick Hundley in connection with a series of investments, loans, assignments, and transactions related to various development projects in Costa Rica. Hundley filed a counterclaim against Daystar and a third-party complaint against David Byker; Jaco Rentals, LLC; Lost Beach Properties, LLC; and Byker & Associates, Inc., asserting claims related to the Costa Rican projects, including alleged breaches of contract, misrepresentations, conversion, and other wrongful acts. The parties' claims involved the allegedly wrongful conduct of Hundley and David Byker in connection with the projects, which were developed, financed, and managed through various entities that were owned or controlled by Hundley, David Byker, or both men together. Hundley moved for leave to file a second amended counterclaim and third-party complaint, seeking to add eight additional business entities as third-party defendants; each entity was formed in a foreign jurisdiction. The court, Karen J. Miedema, J., denied the motion, reasoning that under *Wojtczak v American Life Ins Co*, 293 Mich 449 (1940), the court lacked subject-matter jurisdiction over the claims given that each claim involved the internal affairs of foreign entities. The court thereafter granted summary disposition in favor of Hundley under MCR 2.116(C)(4) for lack of subject-matter jurisdiction. Daystar; David Byker; Jaco Rentals, LLC; Lost Beach Properties, LLC; and Byker & Associates, Inc., appealed.

The Court of Appeals *held*:

Subject-matter jurisdiction is a court's power to hear and determine a cause or matter. In that regard, MCL 600.605 provides that circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except when exclusive jurisdiction is given in Michigan's Constitution or by statute to some other court or when the circuit courts are denied jurisdiction by the Constitution or statutes of this state. Under MCL 600.3605, circuit courts have broad subject-matter jurisdiction over claims involving corporations. When a court has jurisdiction over the parties and

subject matter, it may, in its discretion, decline to exercise that discretion when convenience of the parties and ends of justice would be better served if the action were brought and tried in another forum. In that regard, the internal-affairs doctrine provides that, in general, state and federal courts sitting in one state will decline to interfere with or control by injunction the management of the internal affairs of a corporation organized under the laws in another state. *Wojtczak*—which held that Michigan courts will not (not cannot) assume jurisdiction over a cause of action in which a party seeks to enjoin a foreign corporation by exercising control or management of the internal affairs of the foreign corporation—recognized that a trial court's discretion in determining whether it should decline jurisdiction over certain actions involving a foreign corporation should be guided by the choice-of-law considerations implicated by the internal-affairs doctrine; *Wojtczak* did not negate the subject-matter jurisdiction a circuit court otherwise holds under MCL 600.605. In this case, none of the parties' claims required the trial court to become involved in the management of the internal affairs of a foreign business entity. Accordingly, the trial court erred by dismissing the case for want of subject-matter jurisdiction because neither *Wojtczak* nor the internal-affairs doctrine deprived the court of jurisdiction to adjudicate the parties' claims.

Reversed and remanded.

COURTS — JURISDICTION — INTERNAL-AFFAIRS DOCTRINE — CHOICE-OF-LAW CONSIDERATIONS.

Under the internal-affairs doctrine, state and federal courts sitting in one state will, in general, decline to interfere with or control by injunction the management of the internal affairs of a corporation organized under the laws in another state; a trial court's discretion in determining whether it should decline jurisdiction over certain actions involving a foreign corporation is guided by the choice-of-law considerations implicated by the internal-affairs doctrine; the internal-affairs doctrine does not negate the subject-matter jurisdiction a circuit court otherwise holds under MCL 600.605.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *John R. Oostema*, and *E. Thomas McCarthy*) for Daystar Seller Financing, LLC; David Byker; Jaco Rentals, LLC; Lost Beach Properties, LLC; and Byker & Associates, Inc.

Keller & Almassian, PLC (by *Michael D. Almassian* and *Nicholas S. Laue*) and *Yearout & Traylor, PC* (by *Jason L. Yearout*) for Patrick Hundley.

Before: MURRAY, C.J., and CAMERON and LETICA, JJ.

PER CURIAM. Plaintiff/counterdefendant, Daystar Seller Financing, LLC (Daystar), appeals by right an order granting summary disposition in favor of defendant/counterplaintiff/third-party plaintiff, Patrick Hundley, pursuant to MCR 2.116(C)(4) for lack of subject-matter jurisdiction.[1] We reverse and remand for further proceedings.

This case arises out of a series of investments, loans, assignments, and transactions related to various development projects in Costa Rica. The precise details of the parties' dealings remained unproved when the trial court dismissed the case. For purposes of this appeal, it will suffice to say that the disputes at issue involve the allegedly wrongful conduct of Hundley and counterdefendant[2]/third-party defendant, David Byker, in connection with the Costa Rican projects. The projects were developed, financed, and managed, directly or indirectly, through a slew of entities that were owned or controlled by Hundley, Byker, or both men together. The causes of action raised in Daystar's[3] 17-count amended complaint and Hundley's 12-count amended counterclaim and third-party complaint as-

[1] Counterdefendant/third-party defendant David Byker (Byker) and third-party defendants Jaco Rentals, LLC, Lost Beach Properties, LLC, and Byker & Associates, Inc., also appeal the order by right. However, because appellants collectively presented this appeal in terms of Daystar's rights, we will refer to Daystar only throughout this opinion unless otherwise required for context.

[2] Although Byker is identified as a counterdefendant/third-party defendant throughout the lower court proceedings, he was not a plaintiff in the original complaint and is therefore more properly designated as a third-party defendant only.

[3] Daystar alleges that each cause of action in its amended complaint was assigned to it by Hundley's respective creditors and the owners of the unlawfully converted properties and assets.

sert various theories of liability against the parties for alleged breaches of contract, misrepresentations, acts of conversion, and other wrongful acts committed in the course of the parties' dealings.

Hundley moved for leave to file a second amended counterclaim and third-party complaint which, in pertinent part, sought to add eight additional third-party defendants, all of which were business entities formed under the laws of foreign jurisdictions (Florida, Nevada, and the Turks and Caicos Islands). At a hearing regarding the motion, Hundley raised the issue of subject-matter jurisdiction. Specifically, Hundley noted that under *Wojtczak v American United Life Ins Co*, 293 Mich 449; 292 NW 364 (1940), the trial court did not have subject-matter jurisdiction over the "internal affairs of foreign entities." The trial court agreed and denied the motion for leave to amend.

Hundley then moved for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8) as to all of the remaining claims. Hundley argued that pursuant to *Wojtczak*, the trial court lacked subject-matter jurisdiction over the claims because each claim involved the internal affairs of foreign corporate entities. The trial court entered an opinion and order granting Hundley's motion for summary disposition pursuant to MCR 2.116(C)(4) and dismissing all of the parties' claims. The trial court held that all of the claims fell within the internal-affairs doctrine and that it therefore lacked subject-matter jurisdiction. This appeal followed.

This Court reviews de novo the grant or denial of summary disposition. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). Summary disposition is proper under MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." MCR 2.116(C)(4).

"[W]hether a trial court had subject-matter jurisdiction over a claim is a question of law that is reviewed de novo." *Harris*, 242 Mich App at 309.

"In general, subject-matter jurisdiction has been defined as a court's power to hear and determine a cause or matter." *In re Petition by Wayne Co Treasurer*, 265 Mich App 285, 291; 698 NW2d 879 (2005). With respect to a circuit court's general subject-matter jurisdiction, MCL 600.605 provides:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

Moreover, circuit courts in Michigan have broad subject-matter jurisdiction over claims involving corporations. See MCL 600.3605.

The trial court in this case held that it lacked subject-matter jurisdiction pursuant to *Wojtczak*, 293 Mich 449. On appeal, Daystar argues that the claims involved in this case are distinguishable from those in *Wojtczak* because the causes of action in Daystar's amended complaint do not require the court to interfere with the internal operations of a corporate entity. Daystar further argues that the internal-affairs doctrine implicates choice-of-law concerns and that *Wojtczak* should not be construed as precluding the circuit court's subject-matter jurisdiction in this case. We agree that the trial court's conclusion that it lacked subject-matter jurisdiction was incorrect.

In *Wojtczak*, the defendant, a life insurance company organized under the laws of Indiana and authorized to do business in Michigan, issued a life insurance policy to the plaintiff. *Id*. at 450. Subsequently, the defendant

entered into a contract to reinsure and assume outstanding policy obligations of the American Life Insurance Company, an insolvent Michigan corporation. *Id*. at 450-451. The plaintiff, as a policyholder, filed suit to enjoin the defendant's performance of the contract. *Id*. The trial court dismissed the complaint, holding that the contract concerned "an internal affair of the foreign corporation . . . ." *Id*. at 451.

The Michigan Supreme Court affirmed the trial court, stating, "If the restraint sought undertakes to exercise control or management of the internal affairs of defendant, a foreign corporation, the courts of this State will not assume jurisdiction." *Id*. While this statement may suggest a jurisdictional bar at first glance, it is noteworthy that the *Wojtczak* opinion concluded that Michigan courts "*will not* assume jurisdiction," rather than stating that the courts of this state *cannot* exercise jurisdiction under the circumstances described. See *id*. (emphasis added). Even more significant is the caselaw on which the *Wojtczak* Court relied, namely, *Rogers v Guaranty Trust Co of New York*, 288 US 123; 53 S Ct 295; 77 L Ed 652 (1933).

The stockholder plaintiff in *Rogers* filed suit in a New York federal district court against a New Jersey corporation and its directors and officers, challenging a share distribution scheme as contrary to New Jersey law. *Id*. at 124-125, 128-129. The district court dismissed the action without prejudice, and the United States Supreme Court affirmed the dismissal as an appropriate exercise of the district court's discretion. *Id*. at 132-133. In *Wojtczak*, the Michigan Supreme Court quoted the following language from *Rogers* as support for its conclusion that Michigan courts "will not assume jurisdiction" over cases seeking restraint of the internal affairs of foreign corporations:

> "It has long been settled doctrine that a court—state or federal—sitting in one state will, as a general rule, decline to interfere with, or control by injunction or otherwise, the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile." [*Wojtczak*, 293 Mich at 452, quoting *Rogers*, 288 US at 130.]

Importantly, though not cited by the *Wojtczak* Court, the opinion in *Rogers* went on to explain the following:

> *While the District Court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power*. It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency, and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case. [*Rogers*, 288 US at 130-131 (citations omitted; emphasis added).]

With this understanding of *Rogers* in mind, we agree with Daystar that *Wojtczak* should not be read as negating the subject-matter jurisdiction the trial court otherwise holds under MCL 600.605. A court that has jurisdiction over the parties and subject matter may, as a matter of discretion, decline to exercise its jurisdiction "when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." *Hernandez v Ford Motor Co*, 280 Mich App 545, 551; 760 NW2d 751 (2008) (quotation marks and citations omitted). *Wojtczak* simply recog-

nizes that the choice-of-law considerations implicated by the internal-affairs doctrine should guide a trial court's discretion in determining whether it ought to decline jurisdiction over certain actions involving foreign corporations that would be more appropriately adjudicated in another forum.[4] See *Stewart v Geostar Corp*, 617 F Supp 2d 532, 538 (ED Mich, 2007) (recognizing the internal-affairs doctrine as a choice-of-law principle); *Lapides v Doner*, 248 F Supp 883, 888 (ED Mich, 1965) (stating that *Wojtczak* did not establish a jurisdictional bar).

We further agree with Daystar's contention that the context of the relief sought in *Wojtczak* was significant in determining whether the trial court should decline jurisdiction. In that case, the plaintiff requested that the trial court enjoin the defendant's performance of a contract that it had entered into on the basis of a strategic business decision. *Wojtczak*, 293 Mich at 451. Thus, granting the requested relief would have clearly required the trial court to interfere with and exercise control over the ongoing internal operation and management of the defendant corporation. The *Wojtczak* Court noted in particular that "[t]he suit at bar [was] not upon any pecuniary obligation due plaintiff." *Id*. at 453.

Unlike in *Wojtczak*, the claims in this case do not require the trial court to become involved in the

[4] Viewing the internal-affairs doctrine as a choice-of-law principle is also consistent with relevant provision of the Business Corporation Act, MCL 450.1101 *et seq*., and the Limited Liability Company Act, MCL 450.4101 *et seq*. See MCL 450.2002(2) (stating that the Business Corporation Act does not "authorize this state to *regulate* the organization or internal affairs of a foreign corporation") (emphasis added) and MCL 450.5001 ("Subject to the constitution of this state, the laws of the jurisdiction under which a foreign limited liability company is organized shall govern its organization and internal affairs . . . .").

management of the internal affairs of a foreign business entity. Daystar's numerous claims assert wrongful conduct by Hundley, resulting in losses suffered by Daystar's assignors for which Daystar seeks to recover money damages. Hundley's claims likewise concern Byker's past conduct, undertaken directly or through various business entities, and similarly seek monetary damages. Although Hundley, Byker, and their associated entities were formerly business partners and the transactions underlying the complaint arose during the course of that partnership, the parties do not ask the trial court to " 'interfere with, or control by injunction or otherwise, the management of the internal affairs of a corporation organized under the laws of another State . . . .' " *Wojtczak*, 293 Mich at 452, quoting *Rogers*, 288 US at 130. Rather, they merely ask that the trial court adjudicate the propriety of the parties' conduct in relation to the business venture and their respective rights to recover damages for allegedly wrongful conduct.[5]

In short, the trial court erred as a matter of law by dismissing this case for want of subject-matter jurisdiction because neither *Wojtczak* nor the internal-affairs doctrine deprived the court of jurisdiction to adjudicate the parties' claims. Reversed and remanded for further proceedings. We do not retain jurisdiction.

MURRAY, C.J., and CAMERON and LETICA, JJ., concurred.

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[5] We also note that Daystar—a Florida limited-liability company and the assignee of various causes of action against Hundley—is the only foreign business entity named as a party in this action at the present juncture. While the internal operations of other foreign entities may establish or negate the factual basis for the parties' claims, it is improbable that these proceedings could work to interfere with the internal affairs of these nonparties.

PEOPLE v MUHAMMAD

Docket No. 338300. Submitted September 5, 2018, at Grand Rapids. Decided October 2, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 1021 (2019).

Elamin Muhammad was convicted after a bench trial in the Muskegon Circuit Court of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The court, William C. Marietti, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to five years' imprisonment for the felony-firearm conviction and to 25 to 38 years' imprisonment for the armed-robbery conviction. At trial, the victim could not identify defendant as the perpetrator, who had worn a mask while committing the crime, so the prosecution sought to admit the results of a DNA test that was performed on the insole of a shoe that had come off the perpetrator's foot while fleeing the scene of the crime. The test was performed by a private laboratory after the Michigan State Police were unable to perform a reliable DNA analysis because the sample contained a mixture of DNA from four different donors. The private laboratory took a DNA sample from the shoe, confirmed that it contained DNA from more than one donor, and submitted it to an expert for analysis. This expert used software called STRmix, which employed a mathematical technique to conduct what is known as probabilistic genotype testing, to determine that the chance of someone other than defendant producing the tested DNA profile was one in a hundred billion. Defendant objected to the admission of this evidence on the ground that the probabilistic genotype software was not scientifically reliable, but after a hearing under *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993), the trial court ruled the evidence admissible. Defendant appealed his convictions.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by concluding that the DNA evidence was admissible under MRE 702. MRE 702 provides that if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education may testify thereto in the form of an opinion or otherwise if the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. MRE 702 incorporates the standards of reliability that the United States Supreme Court established in *Daubert*. Under *Daubert*, if an expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand or determine a fact in issue, the court must engage in a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. Factors that bear on this inquiry include, but are not limited to, (1) whether the scientific knowledge or technique can, and has been, tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether there is "general acceptance" of the scientific technique. In this case, the trial court found that STRmix has been sufficiently tested, and facts in the record supported that conclusion, including the testing and subsequent approval of STRmix by several forensic laboratories. Second, the trial court found that STRmix methodology has been subjected to peer review, and this finding was supported by evidence of 16 peer-reviewed articles involving test results of STRmix as well as the acceptance of STRmix by several governmental organizations. Third, the record evidence supported the trial court's findings about the known or potential error rate of STRmix. Testimony indicated that the software had been subjected to numerous validation studies and there were no known errors. Additionally, several forensic laboratories conducted validation studies that had been confirmed, and 40,000 cases in Australia had been processed using STRmix without any discernable error. Fourth, regarding the existence and maintenance of standards controlling the technique's operation, an expert testified that the mathematics underlying STRmix is the Monte Carlo Markov Chain, a well-established scientific principle that is used in weather forecasting, genetics, engineering, the stock market, and other well-established fields, which supported the trial court's findings on this point. Fifth, the trial court did not err by finding that STRmix is a generally accepted method in light of evidence showing that four forensic laboratories within the United States have validated and begun using STRmix, STRmix has been in use within Australia for a number of years, and several governmental and scientific organizations have ac-

cepted probabilistic genotyping generally and STRmix specifically. The trial court's findings on the relevant factors supported its conclusion that the DNA evidence was admissible, and thus the trial court properly discharged its gatekeeper role.

2. The trial court did not err by concluding that the prosecution introduced sufficient evidence to authenticate the shoe and the insole that were subjected to DNA testing, and there was no evidence that protocols for handling the evidence were violated. Under MRE 901, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it. If, after considering such factors, the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, it may be admitted in evidence. The record showed that the police stowed the shoe and the insole in a sealed paper bag before sending the shoe to a Michigan State Police forensic laboratory and that after testing, the shoe and insole were returned to the police department. A detective removed the insole from the shoe, wrapped the shoe insole in plastic, and returned the insole to the paper bag in plastic after taking photographs. The detective testified that defendant's DNA samples were contained in separate plastic tubes. There was no evidence to show that the shoe insole was contaminated or tampered with, and the trial court did not err as a matter of law in holding that the shoe and the shoe insole were properly authenticated. Although defendant raised issues regarding the detective's credibility, such issues were for the trial court to resolve before admitting the evidence. Moreover, the government was not required to prove a perfect chain of custody for evidence to be admitted at trial, and questions relating to how the shoe was handled related to the weight of the evidence, not its admissibility. Further, contrary to defendant's argument, neither MCL 28.175 nor MCL 750.483 governs the admissibility of evidence. Accordingly, the trial court did not abuse its discretion by denying defendant's motion to suppress the evidence.

3. There was sufficient evidence to support defendant's convictions of armed robbery and felony-firearm. The elements necessary to prove armed robbery under MCL 750.529 are that (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force

or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. There was sufficient evidence for the jury to convict defendant of both crimes. The victim testified that the perpetrator assaulted him with a gun at a gas station and demanded money, thus perpetrating a larceny in the course of the assault. Defendant's guilt or innocence turned on the identity of the perpetrator, and sufficient evidence existed to show that defendant was the man who robbed the gas station with a gun, including police observations, surveillance camera recordings, the recovery of a sweatshirt at defendant's residence that matched the sweatshirt that the perpetrator wore during the robbery, the fact that defendant had packs of the same brand of cigarettes that the perpetrator took during the robbery, and the existence of text messages from defendant's phone that showed that he and an accomplice prepared for a robbery by discussing casing locations, stealing a license plate, and bringing guns on the day before the robbery. In addition, in recorded telephone calls that defendant placed from jail, defendant discussed destroying or concealing items related to the robbery. Finally, an expert testified that there was a 1 in 100 billion chance that someone other than defendant contributed DNA to a shoe that the perpetrator left at the scene of the robbery. Viewed in a light most favorable to the prosecution, this evidence was sufficient to prove all the elements of armed robbery and felony-firearm.

4. Defendant did not establish that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel rendered assistance that fell below an objective standard of reasonableness under prevailing professional norms and that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. After a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), the trial court held that trial counsel was not ineffective in failing to present an alibi defense, and the trial court did not err by reaching that conclusion. Defense counsel testified that he investigated the alibi defense and, after contacting two of the three potential alibi witnesses determined that it was not a viable

strategy because of memory and timing issues. The third alibi witness could not be reached, defendant did not know where she was located, there were no funds to hire an investigator, and the alibi defense would not have been reliable. These facts supported the finding that trial counsel thoroughly investigated the defense and made a strategic decision not to pursue the defense. Trial counsel was not ineffective for failing to investigate defendant's cell phone records that purportedly showed he was in Detroit at the time of the robbery because, although his phone may have "pinged" off a cell tower in Detroit, defendant maintained that he drove to Grand Rapids on the morning of the robbery and never mentioned having been in Detroit. Defendant also failed to establish that trial counsel was ineffective because of his handling of the DNA evidence, because there was an allegedly exculpatory e-mail that was not disclosed until after the trial, because certain expert testimony should not have been admitted, or because counsel's failure to disclose the e-mail denied defendant the opportunity to impeach certain witnesses. With respect to challenging the DNA evidence, trial counsel objected to the expert testimony and, as a result, the trial court held a *Daubert* hearing and trial counsel procured an expert witness to testify that STRmix was not reliable. Trial counsel effectively examined this witness and vigorously challenged the testimony of the prosecution's expert. This performance did not fall below an objective standard of reasonableness. The prosecution's reference to an e-mail from a supervisor at a Michigan State Police forensic laboratory, which addressed a prosecution request that the shoe be retested, also did not violate any of defendant's asserted rights, including those under *Brady v Maryland*, 373 US 83 (1963). A *Brady* violation occurs when the prosecution has suppressed material evidence that is favorable to the accused, and the e-mail in question did not amount to material evidence that was favorable to the defense. Evidence that the Michigan State Police could not perform a DNA analysis was already admitted at trial, and defendant failed to show how evidence that the state police lab declined to perform reanalysis of the shoe was material or favorable to the defense in light of what was already presented through testimony. Defendant also failed to articulate how the e-mail or any information concerning the Michigan State Police's inability to reanalyze the shoe would have been relevant for impeachment purposes. Further, defendant did not establish a violation of the Confrontation Clause, because he had the opportunity to confront and cross-examine the prosecution's witnesses at trial. Defendant's arguments that his rights to procedural due process and the effective assistance of counsel were violated when

the district court and the circuit court entered orders even though both courts did not have subject-matter jurisdiction were apparently based on the theory that the prosecution had failed to "certify" the charges into the record, and defendant also made references to "bonding" of the charges, citing federal law. To the extent that defendant argued that there was a violation of a federal procedural statute regarding bonds or otherwise, this argument lacked merit because federal procedural law does not govern in a state proceeding. In all other respects, defendant failed to present cognizable arguments and thereby abandoned review of the issues he raised.

5. The trial court did not abuse its discretion by failing to strike the information or by permitting the prosecution to amend the information. Pursuant to MCR 6.112(H) and MCL 767.76, the trial court had discretion to allow the prosecution to amend the information before, during, or after trial unless the proposed amendment would unfairly surprise or prejudice the defendant. There was nothing in the amended or second amended information that amounted to unfair surprise or prejudice. The amended information removed an alleged accomplice as a codefendant, which did not amount to unfair surprise or prejudice because it did not alter the defense that defendant advanced at trial. Similarly, the initial information put defendant on notice that the prosecution intended to seek a fourth-offense habitual offender enhancement. The first amended information simply notified defendant that this enhancement would result in a mandatory 25-year minimum sentence, and the second amended information added a fourth previous conviction. This did not amount to unfair surprise in that the trial court could have inferred that defendant was aware of his own criminal record. The substance of the information contained defendant's name, the citations to the charged offenses, and the penalties for the offenses, which complied with the requirements of MCR 6.112(D), and the descriptions of the offenses were sufficient to fairly apprise the accused and the court of the offenses charged as required by MCL 767.45(1)(a). The fact that the second amended information did not contain a witness list amounted to no more than harmless error given that the initial information contained a witness list, defendant was apprised of the potential witnesses, and the prosecution filed a witness list. Additionally, the trial court had discretion to permit the prosecution to file an amended information without the name of defendant's alleged accomplice under MCR 6.112(H). Contrary to defendant's argument, the removal of his accomplice's name from the information did not mean that the accomplice could not be referred to at trial; such references were

relevant and therefore admissible under MRE 401 and MRE 402. Assuming that the accomplice was a res gestae witness, defendant did not show that the prosecution's failure to include him on a witness list amounted to anything more than harmless error given that defendant was aware of the accomplice before trial and the accomplice would not have offered favorable testimony for the defense. Defendant's argument that a police detective offered false testimony was without merit, and to the extent there were inconsistencies in the detective's testimony, it was up to the trier of fact to determine whether the detective was credible and what weight to give his testimony. Defendant's argument that his arrest warrant was based on fabricated evidence and false testimony, even if accurate, would not have invalidated his convictions. A court's jurisdiction to try an accused person cannot be challenged on the ground that physical custody of the accused was obtained in an unlawful manner, and nothing in the Constitution requires a court to permit a guilty person rightfully convicted to escape justice because of having been brought to trial against his or her will. Defendant's remaining arguments were indecipherable and therefore abandoned.

Affirmed.

CRIMINAL LAW — EVIDENCE — EXPERT OPINIONS — SCIENTIFIC KNOWLEDGE — DNA SAMPLES FROM MULTIPLE DONORS — PROBABILISTIC GENOTYPE TESTING SOFTWARE — STRMIX.

In a case involving a DNA sample from multiple donors, a trial court does not abuse its discretion by admitting expert testimony based on probabilistic genome testing conducted using the software known as STRmix; the methodology underlying this software meets the standard for admissibility set forth in MRE 702 and *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Susan K. Walsh for defendant.

Elamin Muhammad *in propria persona*.

Before: MURRAY, C.J., and CAMERON and LETICA, JJ.

MURRAY, C.J. Defendant, Elamin Muhammad, appeals by right his bench trial convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to five years' imprisonment for the felony-firearm conviction, and 25 to 38 years' imprisonment for the armed-robbery conviction. The principal issue to decide, which is one of first impression for our appellate courts, is whether the trial court abused its discretion in admitting expert testimony regarding results from probabilistic genotype testing that was conducted using software called "STRmix." We conclude that the trial court did not abuse its discretion in admitting the results from this testing, and because there are no other errors requiring reversal, we affirm.

I. ADMISSIBILITY OF EVIDENCE

Defendant argues that the trial court erred in admitting expert testimony on deoxyribonucleic acid (DNA) evidence and in denying his motion to suppress evidence of a shoe that was left at the crime scene. The DNA expert testified at a pretrial hearing regarding STRmix probabilistic genotype testing, a more recent form of DNA testing and a relatively new method of evaluating complex mixtures.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014). "Preliminary questions of law, such as whether a rule of evidence or statute precludes the admission of particular evidence, are reviewed de novo . . . ." *Id*. Necessarily, a trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*.

A. DNA EVIDENCE

1. BACKGROUND FACTS

At trial, the victim of the robbery could not identify the perpetrator because the perpetrator wore a mask that covered his face. While fleeing the scene, a shoe came off the perpetrator's foot as the victim shot at him with a weapon. Police recovered the shoe and sent it to a Michigan State Police forensic laboratory. At the laboratory, police obtained a sample from the shoe but could not perform a reliable DNA analysis because the sample contained a mixture from four different donors. Police then sent the shoe to Mitotyping Technologies, a private forensic laboratory in Pennsylvania.

Charity Holland was a DNA analyst at Mitotyping, and she testified as an expert in DNA analysis. On November 25, 2014, Holland received a size 9 left shoe from the Norton Shores Police Department. The insole of the shoe was outside the shoe in a plastic bag. Holland took a sweat sample from the toe region of the insole of the shoe for testing. She described the sample as a "low level DNA profile," and it was mixed with DNA from another donor. She agreed that the entire DNA profile was "degraded" and that defendant could not be excluded from the sample.

Holland consulted with another expert, John Buckleton, Ph.D., about probabilistic genotyping of DNA samples that contain DNA from more than one donor. Specifically, after Holland obtained a sample with more than one donor, Dr. Buckleton took the sample that Holland developed from the shoe insole and performed statistical interpretation of the profiles using a software program called STRmix. Before trial, defendant objected to the results of Dr. Buckleton's use of probabilistic genotype software, and the trial court

held a *Daubert*[1] hearing. At the hearing, the prosecution primarily relied on the expert testimony of Dr. Buckleton, and the defense presented the expert testimony of Karl Reich, Ph.D.

On December 17, 2015, the trial court entered an opinion and order ruling that the results of the STRmix probabilistic genotyping analysis were admissible under MRE 702. The trial court found that STRmix had received adequate validity testing, that there were multiple validation tests, and that the Erie County Forensic Laboratory, the San Diego Crime Laboratory, the United States Army, and the Federal Bureau of Investigation had all conducted independent validation studies on STRmix. The trial court also noted that Dr. Buckleton testified that mock samples mimicked field samples and that another expert conducted validation studies in compliance with applicable guidelines. Furthermore, Dr. Buckleton had submitted the validation studies for peer review, and the New York State Commission on Forensic Science (NYSCFS) considered its DNA Subcommittee recommendation and approved STRmix for casework. Although the prosecution filed a posthearing "clarification" of Dr. Buckleton's testimony in which it alerted the trial court to the miscalculation of some results in Queensland, Australia, the trial court noted that the miscoding involved a three-person mixture.

The trial court continued, explaining:

> Following the NYSCFS approval, at least two cases in New York utilized opinions based on STRmix evaluations. The U.S. Army used the STRmix program for evidence submitted in court-martials following validation testing by laboratories that adhered to the SWGDAM standards.

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[1] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Many of these validation tests were published for peer review. The only evidence submitted of any criticism of the validation testing's methodology came from Dr. Reich. He acknowledged that the only other critic he was aware of was a scientist employed in his laboratory who had been involved in the development of a software program similar to STRmix known as [TrueAllele] . . . . To the contrary, there is general acceptance of STRmix among very significant figures in the field of DNA analysis. It is also clear that STRmix validity testing comported with recognized standards in this discipline and was subjected to peer review publications along with the program's algorithm.

Another factor ripe for consideration is whether mathematical experts outside litigation rely upon the concepts forming the STRmix program. The concept that STRmix relies upon is probabilistic genotyping and the mathematical principle supporting probabilistic genotyping is Monte Carlo Markov Chain (MCMC). This technique is widely used in weather forecasting, computational biology and linguistics, genetics, engineering, physics, aeronautics, the stock market, and social sciences.

The trial court concluded by holding as follows:

1. Multiple entities have extensively tested STRmix for validity, 2. The testing process adhered to generally accepted standards, 3. Experts in the field analyzed STRmix through peer review publication, 4. Of the hundreds of tests done, the only errors discovered involved extremely low levels of DNA but no specific error rate has been developed, 5. The concept of probabilistic genotyping is accepted in the community of DNA analysts and is in the process of achieving preferred status over conventional approaches like [Cumulative Probability Inclusion], 6. The MCMC principles underlying probabilistic genotyping and the STRmix program are relied upon by experts in many fields outside the context of litigation, and 7. Courts in New York have admitted STRmix results, and courts in Pennsylvania, Virginia, New York and Ohio have admitted results from a program based upon similar principles. STRmix meets the reliability criteria for admission under [MRE] 702.

At trial, before Dr. Buckleton testified for the prosecution, the trial court admitted the testimony from the *Daubert* hearing as substantive evidence.[2] Dr. Buckleton then testified that he applied the STRmix statistical interpretation to the DNA sample that Holland developed at Mitotyping and that the results of the STRmix analysis showed that "[the] chance of someone [other than defendant] producing this profile is one in one hundred billion." Dr. Buckleton agreed that the DNA sample showed the presence of a minor donor and that it was possible that the minor donor wore the shoe during the robbery.

2. ANALYSIS

MRE 702 governs the admissibility of expert witness testimony, and it provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 incorporates the standards of reliability that the United States Supreme Court established in

[2] In addition, following Holland's testimony, defendant moved to suppress the DNA evidence on grounds that Detective Kyle Neher of the Norton Shores Police Department contaminated the evidence when he removed the shoe insole from the shoe in the presence of defendant's DNA sample and took the insole to a photography shop for photographing. The trial court denied the motion, ruling that Detective Neher's conduct went to the weight of the evidence as opposed to its admissibility.

Daubert v Merrell Dow Pharm, Inc, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), in interpreting the equivalent federal rule of evidence. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782; 685 NW2d 391 (2004). Under *Daubert*, a trial court must "determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 US at 592. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id*. at 592-593. Some factors that bear on the trial court's inquiry include: (1) whether the scientific knowledge or technique can, and has been, tested, (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error," (4) "the existence and maintenance of standards controlling the technique's operation," and (5) whether there is "general acceptance" of the scientific technique. *Id*. at 593-594. However, these factors are not exclusive; instead, "[m]any factors will bear on the inquiry . . . ." *Id*. at 593.

"Pursuant to *Daubert* and MRE 702, 'the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes.' " *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008), quoting *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007) (opinion by DAVIS, J.). In other words, " '[t]he inquiry is not into whether an expert's opinion is necessarily correct or universally accepted,' " it " 'is into whether the opinion is rationally derived from a sound foundation.' " *Unger*, 278 Mich App at 217 (citation omitted). "The standard focuses on the scientific

validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony." *Id*. at 217-218.

In applying the *Daubert* factors to the facts it found controlling, the trial court did not abuse its discretion in admitting the STRmix results at trial.

a. TESTING

The first *Daubert* factor concerns whether STRmix can be or has been tested. See *Daubert*, 509 US at 593. The trial court found that it has been sufficiently tested, and facts in the record support that conclusion. Specifically, Dr. Buckleton testified that the mathematics underlying the software involve the well-established MCMC method and that STRmix underwent various different validation methods. For instance, the development team performed the first 500 steps of the MCMC by hand, performed "true donor" and "false donor" tests, and tested STRmix against other software. Dr. Buckleton testified that STRmix provided a different answer from TrueAllele[3] in less than 1% of trials.

As the trial court recognized, other laboratories subjected STRmix to validation studies, and STRmix has been approved for use by four forensic laboratories in the United States. Although Dr. Reich testified that STRmix could not account for field conditions, Dr. Buckleton testified that testing of STRmix had accounted for "real world situations." Specifically, DNA samples were degraded and then tested with the software. Dr. Buckleton testified that STRmix was subjected to "massive tests of false donors, hundreds of

[3] TrueAllele is competing DNA interpretation software that is generally accepted in the scientific community.

millions," and that the software had not made a "false positive" identification. Dr. Buckleton disagreed with Dr. Reich's testimony that STRmix could not account for field conditions, explaining that STRmix was tested against cases from the field to recreate field conditions in the laboratory. Similarly, an expert from the Erie County Forensic Laboratory completed a validation process that included testing multiple known samples. STRmix confirmed the laboratory's previous findings. Consequently, the trial court did not clearly err in concluding that STRmix has been properly tested.

b. PEER REVIEW

The second *Daubert* factor concerns whether the methodology has been subjected to peer review. See *Daubert*, 509 US at 593. "That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science." *Daubert v Merrell Dow Pharm, Inc*, 43 F3d 1311, 1318 (CA 9, 1995). The trial court did not clearly err in its findings that the STRmix methodology has been subjected to peer review. Dr. Buckleton testified that STRmix has been subjected to peer review; he identified a list of 16 peer-reviewed articles involving test results of STRmix. The NIST[4] presented scientific information on probabilistic genotyping, and SWGDAM[5] published guidelines for probabilistic genotyping in June 2015. In addition, STRmix was presented to the New York Commission on Forensic Science and to the Commission's DNA Subcommittee. The Commission adopted the DNA Subcommittee's

[4] National Institute of Standards and Technology.

[5] Scientific Working Group on DNA Analysis Methods.

recommendation to accept STRmix for casework. Record evidence supports the trial court's findings.

c. KNOWN OR POTENTIAL ERROR RATE

The third *Daubert* factor concerns the known or potential error rate of the method or theory. See *Daubert*, 509 US at 594. Again, the record evidence supports the trial court's findings. Specifically, Dr. Buckleton testified that he had never detected a "false positive or false negative" with STRmix. He stated that a "zero error rate" would be "a big call," but he had never discovered an error. According to Dr. Buckleton, the software has been subjected to numerous validation studies and there were no known errors. Additionally, several forensic laboratories have conducted validation studies, and the validation studies have been confirmed. Dr. Buckleton testified that all but one of the states in Australia have been using STRmix and that there have been 40,000 cases processed in Australia without any discernable error. And, although after the *Daubert* hearing the prosecution acknowledged that it became aware that a previous version of STRmix had a "miscode," which "led to the need to recalculate Likelihood Ratios in a very small number of cases," as the trial court recognized, the code only impacted samples with more than two donors, the miscode had been replaced, and it was not used in this case.

d. STANDARDS CONTROLLING OPERATION

The fourth *Daubert* factor involves "the existence and maintenance of standards controlling the technique's operation[.]" See *Daubert*, 509 US at 594. Dr. Buckleton testified that STRmix is based on algorithms, and he explained the principles underlying STRmix:

> So if I split the construction of the software into having two fundamental principles, the mathematical principles and the molecular biology principles, the mathematical principles are standard mathematical principles and they date back to the early 1900s. And they're called (indistinguishable) and they're a dominant method now in mathematical procedures treating these types of problems. If we come to the molecular biology these are based on empirical studies of the variability of peak and stutter heights in different multiplexes and at different template levels and they're published in peer-reviewed articles.

As the trial court found, and as testified to by Dr. Buckleton, the mathematics underlying STRmix is the MCMC, a well-established scientific principle that is used in weather forecasting, genetics, engineering, the stock market, and other well-established fields. Again, the trial court's findings were not clearly erroneous.

e. GENERAL ACCEPTANCE

The trial court found that STRmix is a generally accepted method. The evidence supports that conclusion, showing that four forensic laboratories within the United States have validated and begun using STRmix. In addition, STRmix has been in use within Australia for a number of years. Dr. Buckleton testified that SWGDAM has recognized probabilistic genotyping and published guidelines for probabilistic genotyping in June 2015. In addition, the New York Commission on Forensic Science[6] adopted the recommendation of its DNA Subcommittee to approve STRmix for casework at the Erie County Forensic Laboratory.

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[6] The Commission on Forensic Science was composed of scientists and attorneys, and the DNA Subcommittee was composed entirely of scientists.

Having considered these factors as a whole, we conclude that the trial court did not abuse its discretion in admitting the DNA evidence. As discussed above, the trial court's findings on the relevant factors were not clearly erroneous because they had ample support in the evidence. That evidence, primarily based on Dr. Buckleton's testimony, showed that STRmix uses well-established mathematical and scientific methods and that the software has undergone various validation studies. The validation studies included manual calculations, true and false donor tests, and tests against other software. STRmix has also been validated by four forensic laboratories in the United States and is being validated by other laboratories. Dr. Buckleton testified that the validation studies subjected STRmix to field conditions and that he was unaware of any false positive or false negative identification.

In addition, STRmix was subjected to peer review and approved for casework by the New York Commission on Forensic Science. More generally, probabilistic genotyping has been subjected to scrutiny by SWGDAM and the NIST. Dr. Buckleton testified that he was unaware of any false positive or false negative results and that numerous validation studies did not produce any known errors. Moreover, STRmix has been validated and was in use at four different laboratories in the United States.

Based on this record, the trial court did not abuse its discretion in concluding that the DNA evidence was admissible under MRE 702. The trial court's findings on the relevant factors supported its conclusion that the DNA evidence was admissible, and thus the trial court properly discharged its gatekeeper role. While Dr. Reich offered testimony to counter Dr. Buckleton,

the trial court was free to give more weight to Dr. Buckleton's testimony. See *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014) (noting that "[t]his Court will not interfere with the trier of fact's determinations regarding the weight of the evidence or the credibility of witnesses").[7]

B. EVIDENCE OF SHOE INSOLE

Defendant argues that Detective Neher contaminated the shoe insole that Mitotyping tested when he removed it from the shoe, wrapped it in plastic, and brought it to a photography shop for photographing. However, to the extent that defendant argues the insole was degraded and that the trial court should have given the evidence little weight, the handling of the shoe went to the weight of the evidence, not to its admissibility. See *People v White*, 208 Mich App 126, 132; 527 NW2d 34 (1994) (noting that "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility") (quotation marks and citation omitted). The trial court, as the trier of fact, was free to weigh the evidence in the manner that it deemed appropriate. See *Stevens*, 306 Mich App at 628.

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[7] In his Standard 4 brief, defendant argues that the STRmix evidence should have been suppressed under MRE 403. He also appears to argue that Dr. Buckleton's testimony was inadmissible because it was based on a sample that was "subterfuge." However, we have already concluded that the trial court did not abuse its discretion in admitting the DNA evidence. To the extent that defendant argues trial counsel should have raised an objection under MRE 403, that argument lacks merit because the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Accordingly, trial counsel was not deficient for failing to raise an MRE 403 objection. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

In his Standard 4 brief,[8] defendant argues that the trial court erred because the shoe and shoe insole were not properly authenticated and that Detective Neher's conduct violated protocols for handling the evidence.

MRE 901 governs authentication of evidence in Michigan, and it provides in relevant part that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). "Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it." *People v Beamon*, 50 Mich App 395, 398; 213 NW2d 314 (1973). "If, after considering such factors, the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Id*. at 398-399.

The trial court did not err in finding that the prosecution introduced sufficient evidence to authenticate the shoe and the insole in accordance with MRE 901. The record showed that police stowed the shoe and the insole in a sealed paper bag before sending the shoe to a Michigan State Police forensic laboratory, and that after testing, the shoe and insole were returned to the police department. Detective Neher removed the insole from the shoe, wrapped the shoe insole in plastic, and returned the insole to the paper bag in plastic after taking photographs. Detective Neher testified that defendant's DNA samples were contained in separate plastic tubes. Thus, there was no evidence to show that the shoe insole was contaminated or tampered with,[9]

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[8] See Administrative Order No. 2004-6, 471 Mich c, cii (2004).

[9] Defendant appears to argue that Detective Neher was not credible and that, contrary to his testimony, he tampered with the evidence.

and the trial court did not err as a matter of law in holding that the shoe and the shoe insole were properly authenticated. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to suppress the evidence, and defendant is not entitled to relief. See MRE 103(a)(1).[10]

II. SUFFICIENCY OF THE EVIDENCE

We reject defendant's argument that there was insufficient evidence to support his convictions of armed robbery and felony-firearm. When reviewing an argument following a bench trial that insufficient evidence existed to prove the elements of the crimes, "this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). "Circumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the elements of the offense." *Id*. "[T]his Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

However, issues of credibility involve a factual determination, and "[t]he trial court acts as the fact finder in determining questions of fact preliminary to the admissibility of evidence." *People v Burns*, 494 Mich 104, 117 n 39; 832 NW2d 738 (2013). Moreover, "the government need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility." *White*, 208 Mich App at 132 (quotation marks and citation omitted).

[10] Defendant also argues that Detective Neher's conduct with respect to the shoe violated MCL 28.175 and MCL 750.483. However, neither of these statutes governs the admissibility of evidence.

Defendant was convicted of armed robbery and felony-firearm. The elements necessary to prove armed robbery under MCL 750.529 are:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

There was sufficient evidence for the jury to convict defendant of both crimes. The victim testified that the perpetrator assaulted him with a gun at a Shell gas station in Muskegon and demanded money, thus perpetrating a larceny in the course of the assault. Defendant's guilt or innocence turned on the identity of the perpetrator, and sufficient evidence existed to show that defendant was the man who robbed the Shell gas station with a gun. Specifically, the robbery occurred at approximately 6:00 a.m. on July 14, 2014, and about two hours earlier that morning, a police officer observed defendant and Shawn Mayberry in Nunica, a short distance away. According to a witness, defendant was in the same vehicle that was later linked to the robbery. Additionally, a surveillance camera recorded the vehicle fleeing the crime scene. This evidence supported that defendant participated in the robbery with Mayberry.

Other evidence showed that defendant was the man who robbed the gas station. Police recovered a sweatshirt at defendant's residence that had markings on it that matched the markings on the sweatshirt that the perpetrator wore during the robbery. Although the perpetrator's sweatshirt also appeared to have a drawstring, the trial court found that the drawstring could have been attached to another garment underneath the sweatshirt. There was no evidence to counter the trial court's finding with respect to the sweatshirt.

In addition, police recovered Newport cigarettes at defendant's place of residence, which was the same brand of cigarettes that the perpetrator took during the robbery. More significantly, police recovered text messages from defendant's phone that showed that he and Mayberry prepared for a robbery by discussing casing locations, stealing a license plate, and bringing guns on the day before the robbery. In addition, in recorded telephone calls that defendant placed from jail, defendant discussed destroying or concealing items including an "iron" and shoes. Police testified that "iron" is a slang term that is used for "gun." See *People v Kowalski*, 489 Mich 488, 509 n 37; 803 NW2d 200 (2011) (attempts to conceal evidence are probative of consciousness of guilt). Finally, an expert testified that there was a 1 in 100 billion chance that someone other than defendant contributed DNA to a shoe that the perpetrator left at the scene of the robbery. On this record, there was sufficient evidence to prove all of the elements of armed robbery and felony-firearm.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that, in a variety of ways, he was denied the effective assistance of counsel. None of his arguments has any merit.

Whether defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, while constitutional issues are reviewed de novo. *Id*. In cases like this one where the trial court held an evidentiary hearing only to address certain assertions of ineffective assistance of counsel, this Court's review of the arguments on which there was no evidentiary hearing is limited to mistakes apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show that (1) counsel rendered assistance that "fell below an objective standard of reasonableness" under prevailing professional norms and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000) (quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citation omitted). Furthermore, "[b]ecause the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Id*.

After trial, defendant moved for a new trial or a *Ginther*[11] hearing in part on the basis that trial counsel was ineffective for failing to pursue an alibi defense. After holding a *Ginther* hearing, at which trial counsel testified, the trial court held that trial counsel was not

[11] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

ineffective in failing to present an alibi defense. As explained below, the trial court did not err in that conclusion. At the *Ginther* hearing, trial counsel testified that he investigated the alibi defense and determined that it was not a viable strategy. Trial counsel contacted two of the three potential alibi witnesses and could not locate the third. After contacting one of the potential alibi witnesses, counsel determined that the witness would not be helpful because she was unable to recall what time defendant allegedly arrived at the Seaway Motel, and she was not sure if Mayberry dropped off defendant at the motel after the robbery. Moreover, her linking defendant to the Seaway Motel, located near the scene of the robbery, would have placed defendant near the robbery. Trial counsel also contacted Mayberry, but Mayberry insisted that he was not in Muskegon on the morning of the robbery, which counsel considered problematic for the alibi defense because defendant stated that Mayberry dropped him off at a Muskegon hotel on the morning of the robbery.

Finally, trial counsel could not locate a third alibi witness, and defendant did not know where she was located. Trial counsel did not hire an investigator because there were no funds to do so and because he investigated the alibi defense and determined it was not reliable. Trial counsel testified that defendant agreed to let him drop the alibi defense. Based on this record, defendant has failed to show that the trial court erred in concluding that trial counsel was not deficient in declining to pursue the alibi defense. The facts support the finding that trial counsel thoroughly investigated the defense and made a strategic decision not to pursue the defense. Under these facts, trial counsel's decision was not a product of deficient performance. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d

94 (2002) ("Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.").

We also reject defendant's argument that trial counsel was ineffective for failing to investigate defendant's cell phone records that purportedly show he was in Detroit at the time of the robbery, as it is not supported by any facts brought forth at the hearing. Rather, at the *Ginther* hearing, trial counsel testified that the prosecution provided defendant's cell phone records to the defense at the outset of the trial and that defendant was informed why the records showed that his phone "pinged" off a cell phone tower in Detroit. Trial counsel testified that he did not pursue the cell phone records as part of a defense because (1) defendant maintained that he drove to Grand Rapids on the morning of the robbery and (2) defendant never mentioned having been in Detroit. On this record, the trial court did not err in finding that trial counsel made a strategic decision with respect to the cell phone records and that the decision did not amount to deficient performance. See *Davis*, 250 Mich App at 368.

Next, in his Standard 4 brief, defendant raises multiple assertions of ineffective assistance of counsel. Specifically, defendant argues that trial counsel was ineffective (1) for his handling of the DNA evidence, (2) because there was an allegedly exculpatory e-mail that was not disclosed until after the trial, (3) because Dr. Buckleton's testimony should not have been admitted, and (4) because counsel's failure to disclose the e-mail denied defendant the opportunity to impeach Detective Neher and other witnesses. We reject each of these arguments.

At the outset, we note the important proposition that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Id*. Defendant has failed to show that trial counsel's decisions on how to challenge the DNA evidence fell below an objective standard of reasonableness. Trial counsel objected to Dr. Buckleton's testimony, and as a result, the trial court held a *Daubert* hearing and trial counsel procured an expert witness, Dr. Reich, to testify that STRmix was not reliable. Trial counsel effectively examined Dr. Reich and vigorously challenged Dr. Buckleton's testimony. This performance did not come close to falling below an objective standard of reasonableness.

The prosecution's reference (on the second day of trial) to an e-mail from Joel Schultze of the Michigan State Police forensic laboratory in Grand Rapids also did not violate any of defendant's asserted rights. In the e-mail, Schultze indicated that the prosecution requested that the shoe be retested, to which Schultze responded, "[I]t is my opinion that the reanalysis wouldn't produce a single source DNA profile for comparison . . . ." Schultze also stated that "[i]f further analysis is still being requested, it would be classified as a reanalysis and approval would have to go through the proper channels . . . ." Defendant argues that the failure to disclose the e-mail amounted to a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), ineffective assistance of counsel, and a violation of the Confrontation Clause. We reject each of these arguments.

"[T]he components of a 'true *Brady* violation' are that: (1) the prosecution has suppressed evidence; (2)

that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014) (comma omitted). The e-mail from Schultze did not amount to material evidence that was favorable to the defense. At trial, a forensic scientist at the Michigan State Police forensic laboratory in Grand Rapids testified that although she took a forensic sample from the shoe and the sample contained four DNA donors, she could not perform a DNA interpretation. Thus, evidence that the Michigan State Police could not perform a DNA analysis was already admitted at trial. Defendant fails to show how evidence that the state police lab declined to perform reanalysis of the shoe was material or favorable to the defense in light of what was already presented through testimony. Accordingly, there was no *Brady* violation and trial counsel was not deficient in failing to discover the e-mail before the second day of trial.

Defendant argues, citing trial counsel's cross-examination of Holland in which Holland was questioned regarding whether she was aware that the insole of the shoe had previously been tested, that the e-mail could have been used for impeachment purposes. But defendant fails to articulate how the e-mail or any information concerning the Michigan State Police's inability to reanalyze the shoe would have been relevant for impeachment purposes. Holland's testimony showed that previous testing would not have impacted her conclusions and, moreover, Schultze indicated in his e-mail that reanalysis would likely not have produced a single-source profile.[12] Defendant has not shown that trial counsel's questioning of Holland

[12] Of course, Holland did not need a single-source profile because Dr. Buckleton was able to analyze mixed source profiles using STRmix. As we have concluded, the STRmix results were properly admitted at trial.

was deficient under an objective standard of reasonableness or that he was denied the right to confront the witnesses against him. See *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008) ("The questioning of witnesses is presumed to be a matter of trial strategy."). For the same reasons, defendant has not established a violation of the Confrontation Clause, as he had the opportunity to confront and cross-examine the prosecution's witnesses at trial. See *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001). The absence of the e-mail did not deprive defendant of this opportunity.[13]

Next, in his Standard 4 brief, defendant argues that his rights to procedural due process and the effective assistance of counsel were violated when the district court and the circuit court entered orders even though both courts did not have subject-matter jurisdiction. Defendant presents a host of incoherent arguments on each of these issues. He appears to contend that the prosecution failed to "certify" the charges into the record. Defendant also references "bonding" of the charges and cites federal law. To the extent that defendant is arguing that there was a violation of a federal procedural statute regarding bonds or otherwise, this argument lacks merit as federal procedural

[13] Defendant argues that there was inconsistency with respect to Detective Neher's testimony about the shoe insole. Even assuming that there was inconsistency with respect to whether the insole had previously been tested, defendant fails to articulate how this was relevant to the defense when Holland testified that previous testing would not have impacted her conclusions. Trial counsel was not deficient in cross-examining Detective Neher. "In any case, the government need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility." *White*, 208 Mich App at 132 (quotation marks and citation omitted).

law does not govern in a state proceeding. In all other respects, defendant has failed to present cognizable arguments, and he abandoned review of the issues. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Additionally, we reject any argument that the trial court lacked subject-matter jurisdiction or that trial counsel was ineffective for failing to object on that basis.

IV. FAILURE TO STRIKE THE INFORMATION

In his Standard 4 brief defendant also argues that the trial court erred in failing to strike the information and in permitting the prosecution to amend the information.

"A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or [when it] makes an error of law." *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (citations omitted).

The trial court did not abuse its discretion in denying defendant's motion to strike the information or in permitting the prosecution to amend the information. Pursuant to MCR 6.112(H), the trial court had discretion to allow the prosecution to amend the information before, during, or after trial "unless the proposed amendment would unfairly surprise or prejudice the defendant." See *McGee*, 258 Mich App at 686, 689; see also MCL 767.76 (providing that a trial court has discretion to grant a motion to amend the information). Here, there was nothing in the amended or second amended information that amounted to unfair surprise or prejudice. The amended information removed

Mayberry as a codefendant. Defendant cannot show that this amounted to unfair surprise or prejudice in that removal of the codefendant did not alter the defense that defendant advanced at trial. Similarly, the initial information put defendant on notice that the prosecution intended to seek a fourth-offense habitual offender enhancement. The first amended information simply notified defendant that this enhancement would result in a mandatory 25-year minimum sentence. The second amended information simply added a fourth previous conviction. This did not amount to unfair surprise in that the trial court could have inferred that defendant was aware of his own criminal record.

In addition, the substance of the information complied with the requirements of MCR 6.112(D). The information contained defendant's name, the citations to the charged offenses, and the penalties for the offenses. The included descriptions of the offenses were sufficient to "fairly apprise the accused and the court of the offense[s] charged." MCL 767.45(1)(a). In addition, the prosecutor signed the initial information and both amended versions of the information. Furthermore, the initial information contained a witness list. Although the second amended information did not contain a witness list, this amounted to no more than harmless error; defendant was apprised of the potential witnesses and the prosecution filed a witness list such that defendant cannot show that failure to file a subsequent witness list amounted to prejudice. See MCR 6.112(G). Additionally, the trial court had discretion to permit the prosecution to file an amended information without Mayberry's name. See MCR 6.112(H).

Defendant also argues that after Mayberry was removed from the information, all reference to

Mayberry should have been barred from the trial and the prosecution should have been required to produce Mayberry as a res gestae witness. These arguments lack merit. Mayberry's absence from the list of accomplices did not mean that the prosecution could not refer to Mayberry at trial. Reference to Mayberry was relevant and therefore admissible. See MRE 401 and MRE 402. To the extent defendant argues that the prosecution was required to list Mayberry as a res gestae witness on the amended and second amended information, defendant is correct that the prosecution must attach a list of all known res gestae witnesses. See MCR 6.112(D). However, assuming that Mayberry was a res gestae witness, defendant has not shown that the prosecution's failure to include him on an attached list amounted to anything more than harmless error. See MCR 6.112(G). The defense was aware of Mayberry's potential involvement in the robbery from the outset of the case, as trial counsel testified at the *Ginther* hearing that he contacted Mayberry and that Mayberry insisted that he was not in Muskegon on the morning of the robbery. Thus, defendant was aware of Mayberry before trial, and Mayberry would not have offered favorable testimony for the defense. Accordingly, defendant was not prejudiced and he is not entitled to relief.

We likewise reject defendant's argument that Detective Neher offered false testimony at various points during the proceedings, including the preliminary examination and the bench trial. However, to the extent that defendant points out inconsistencies in Detective Neher's testimony, this involves an issue of witness credibility, and "[t]his Court will not interfere with the trier of fact's determinations regarding the weight of the evidence or the credibility of witnesses." *Stevens*, 306 Mich App at 628.

Finally, defendant also contends that fabricated evidence and false testimony of Detective Neher led to the issuance of the arrest warrant. Defendant appears to contend that because the arrest warrant was invalid, his convictions are void, and he requests a remand for a hearing on the evidence underlying the warrant. However, "a court's jurisdiction to try an accused person cannot be challenged on the ground that physical custody of the accused was obtained in an unlawful manner." *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974). Indeed, "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id*. at 133-134 (quotation marks and citation omitted). Defendant has failed to show that he was denied a fair trial; accordingly, irrespective of whether there were errors associated with the warrant, defendant is not entitled to relief.[14]

Affirmed.

CAMERON and LETICA, JJ., concurred with MURRAY, C.J.

[14] We are unable to decipher defendant's other arguments related to the information, the warrant, and Detective Neher's testimony. Accordingly, these arguments are abandoned. See *Kelly*, 231 Mich App at 640-641 ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

NADIMPALI v BYRRAJU

Docket No. 340405. Submitted October 3, 2018, at Detroit. Decided October 9, 2018, at 9:00 a.m.

Plaintiff, Subrhamanyam R. Nadimpali, and defendant, Padma Byrraju, were married in India in 2005, and they later moved to California where their child was born in 2008. The parties were divorced in California in 2012 and ultimately agreed to joint custody of the child, with defendant having physical custody. In 2014, defendant returned to India because her United States work visa expired. Before her move, the Superior Court of California entered a consent judgment modifying the child-custody determination. Under the 2014 child-custody determination, the parties stipulated to continued joint legal custody of the child and agreed that the child would stay in California with plaintiff until a certain date, after which plaintiff would take the child to India to live with defendant. The parties stipulated that the California court would retain jurisdiction over child custody and visitation and that the jurisdiction could only be changed by the mutual written consent of both parties specifying that the intended temporary move to India was permanent. Plaintiff remarried in 2014 after taking the child to India, and he moved to Michigan with his new wife in 2015. In January 2016, defendant petitioned the Family Court in Hyderabad, India for guardianship and exclusive custody of the child, asserting that the child had lived with defendant in India since April 2014. In March 2016, defendant requested that the California court terminate its jurisdiction over all child-custody matters on the basis that the parties and the child did not reside in California; the California court tentatively ruled that it was not clear whether plaintiff had sufficient contacts with the state to be considered a resident and that whether Michigan or India had jurisdiction over custody was for the courts in Michigan and India to decide. On October 15, 2016, the Indian court granted defendant's petition for exclusive custody of the child. Two days later, plaintiff filed an action in the Wayne Circuit Court, seeking to register the 2014 California child-custody determination pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., and petitioning for enforcement of the determi-

nation. The court, Melissa A. Cox, J., entered an order registering the California child-custody determination, and later denied the motion to enforce the determination without prejudice. Defendant objected to the registration. The trial court vacated the registration order, noting that it lacked jurisdiction to modify the 2014 child-custody determination under the UCCJEA because that order had already been modified by the Indian court and that it had originally granted the registration request on the basis of plaintiff's erroneous averment that the 2014 California child-custody determination had not been modified. The trial court denied plaintiff's motion for reconsideration, and plaintiff appealed.

The Court of Appeals *held*:

1. The UCCJEA was designed to rectify jurisdictional issues by prioritizing home-state jurisdiction and to clarify the exclusive continuing jurisdiction for the state that entered the child-custody determination. Under MCL 722.1102(c), the term "child-custody determination" means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child, and it includes a permanent, temporary, initial, and modification order. Under MCL 722.1105(1), a foreign country is treated as a state of the United States for purposes of UCCJEA jurisdictional requirements. With regard to jurisdiction, MCL 722.1201(1) provides that a court of this state has jurisdiction to make an initial child-custody determination when (1) Michigan is the home state of the child on the date of commencement of the proceeding, or it was the home state of the child within six months before the proceeding was commenced and the child is absent from the state but a parent continues to live in this state, or (2) a court of another state does not have such jurisdiction or a court of the child's home state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum. Under that provision, the court must also find that (1) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with the state other than mere physical presence and (2) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships. MCL 722.1202 provides that once a court enters a child-custody determination consistently with the UCCJEA, that court has exclusive continuing jurisdiction over the determination until (1) a court in this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state

and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships or (2) a court of this state or a court of another state determines that neither the child, nor the parent of the child, nor a person acting as the child's parent presently resides in this state. Under MCL 722.1203, a Michigan court may not modify a child-custody determination entered by a court of another state unless the Michigan court has jurisdiction to make an initial child-custody determination and either the court of the other state determines it no longer has exclusive, continuing jurisdiction or either court determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state.

2. MCL 722.1304 provides that a child-custody determination issued by a court in another state may be registered in Michigan with or without a simultaneous request for enforcement. To register another state's determination, a person must send to the circuit court a letter or other document requesting registration, two copies of the child-custody determination sought to be registered and a sworn statement that the determination has not been modified, and the name and address of the person seeking registration and of each parent or person acting as a parent who has been awarded custody or parenting time in the determination. When the circuit court receives these documents, under MCL 722.1304(2), it must cause the determination to be filed as a foreign judgment and then serve notice to all the parties to allow them the opportunity to contest the registration. MCL 722.1304(4) provides that the circuit court must confirm the registration at a contested-registration hearing unless the person contesting the registration establishes that (1) the issuing court did not have jurisdiction under the UCCJEA, (2) the child-custody determination sought to be registered has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under the UCCJEA, or (3) the person contesting registration was entitled to notice in the proceedings before the court that issued the child-custody determination for which registration is sought, but notice of those proceedings was not given in accordance with the jurisdictional standards set forth in the UCCJEA. Under MCL 722.1305, once a foreign child-custody determination has been registered in this state, a court of this state must recognize and enforce the determination, but the court may not modify the determination except in accordance with the UCCJEA jurisdictional requirements. In that regard, MCL 722.1303(1) provides that a court of this state shall recognize and enforce a child-custody determination of a court of another state if the

latter court exercised jurisdiction that was in substantial conformity with the UCCJEA or the determination was made under factual circumstances meeting the UCCJEA jurisdictional requirements and the child-custody determination has not been modified in accordance with the act. MCL 722.126(3)(c) provides that in a proceeding to modify a child-custody determination, a court of this state must determine whether a proceeding to enforce the child-custody determination has been commenced in another state; if a proceeding to enforce a child-custody determination has been commenced in another state, the court may still proceed with the modification under conditions it considers appropriate. That is, a proceeding for enforcement in another state does not necessarily terminate the jurisdiction of a court in the child's home state to modify a child-custody determination.

3. The trial court in this case did not have jurisdiction under the UCCJEA to make an initial child-custody determination because Michigan was not—and had never been—the child's home state. For that reason, the trial court would have lacked jurisdiction to modify or enforce the California child-custody determination even if the child-custody determination had been registered in this state. Regardless, the California child-custody determination could not be registered in this state because the determination had already been modified by the Indian court. The Indian court had jurisdiction under the UCCJEA to modify the California determination—even though it had not communicated with that court—because India was the child's home state given that he had lived in India with defendant for more than six months before the Indian court granted defendant exclusive custody of the child; the parties and the child had significant connections with India; and evidence concerning the child's care, protection, training, and personal relationships was more likely to be found in India than in any other state. In addition, the California court had determined that it no longer had exclusive, continuing jurisdiction. The trial court did not abuse its discretion when it determined that the Indian order modified the California child-custody determinations; the Indian court accepted defendant's uncontested presentation of the parties' and child's changed circumstances and granted her custody. The 2014 California child-custody determination was therefore not enforceable because it had been modified by the Indian court that had jurisdiction to do so under the UCCJEA. For that reason, the trial court did not abuse its discretion when it vacated the order registering the California child-custody determination.

Affirmed.

PARENT AND CHILD — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — COURTS — JURISDICTION TO MODIFY OUT-OF-STATE CHILD-CUSTODY DETERMINATIONS.

MCL 722.126(3)(c) of the Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1101 *et seq*., provides that in a proceeding to modify a child-custody determination, a court of this state must determine whether a proceeding to enforce the child-custody determination has been commenced in another state; if a proceeding to enforce a child-custody determination has been commenced in another state, the court may still proceed with the modification under conditions it considers appropriate; that is, a proceeding for enforcement in another state does not necessarily terminate the jurisdiction of a court in the child's home state to modify a child-custody determination.

Robert Tomak for plaintiff.

Padma Byrraju *in propria persona*.

Before: JANSEN, P.J., and METER and STEPHENS, JJ.

JANSEN, P.J. Plaintiff appeals as of right the circuit court order vacating its prior registration, pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., of a child-custody determination that had been entered in the Superior Court of California, County of Santa Clara.[1] We affirm.

I. FACTUAL BACKGROUND

The relevant factual background of this case is extensive. The parties were married in India in 2005 and moved to the United Kingdom and then to California. They had one child, who was born in 2008 in the

[1] Under the UCCJEA, the term "child-custody determination" "means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child," and it "includes a permanent, temporary, initial, and modification order." MCL 722.1102(c).

United States. Plaintiff obtained a divorce decree in India in June 2011. Defendant, who contended that she was never served in the India divorce action, filed for divorce in California, where she obtained a judgment of divorce in June 2012. A number of orders regarding custody, visitation, and child support were subsequently entered in California. The parties eventually agreed to joint custody of their child, with defendant having physical custody and plaintiff having parenting time on alternating weeks.

In 2014, defendant's visa status changed, and she had to return to India. Anticipating the change, the parties submitted to mediation, and on February 14, 2014, a detailed stipulated agreement—the child-custody determination whose registration in Michigan is at issue in this appeal—was entered as a consent judgment in the Superior Court of California, County of Santa Clara. In the agreement, the parties indicated their intent to continue sharing joint legal and physical custody of their child, with alternating-week custodial time. The agreement noted that defendant would be leaving the United States on or about January 18, 2014. The child would initially stay in the United States with plaintiff until either April 15, 2014, if plaintiff's employer relocated him to India, or March 30, 2014, if plaintiff continued living in the United States. In either case, plaintiff would bring the child to defendant in India no later than April 15, 2014, and the child would then begin living in India with defendant. The agreement also provided in detail for parenting time in India after the child's arrival. If the parents resumed living in the same country at any time, whether the United States or India, the agreement provided that they would return to the alternating-week custody arrangement.

The agreement also provided that neither party would relocate to a different city "without either written agreement between the parties or further order of this court," that the child's city of residence in the United States would be Santa Clara and in India would be Hyderabad, and that plaintiff was to notify defendant of any travel outside the Santa Clara area. In a separate paragraph, the agreement stated that defendant intended that her relocation would be temporary and that she would return to the United States. The parties stipulated that the California court would retain jurisdiction over the custody matter concerning their child and that "[j]urisdiction of this state may only be changed by the mutual written consent of both parties specifying that the intended temporary move has become permanent." Further, "[t]he parties agree that the Superior Court of the State of California for the County of Santa Clara shall continue to have jurisdiction over all child custody, visitation and support matters other than stated herein, in this case."

Almost two years after the child-custody determination was entered, defendant sought guardianship and exclusive custody of the child by filing a petition on January 13, 2016, in the Family Court in Hyderabad, India. Defendant submitted that, pursuant to the child-custody determination agreement, plaintiff had "handed over the child" to her in Hyderabad on April 3, 2014, and that the child had lived with her in Hyderabad since then. She noted that plaintiff had married another woman in April 2014 and that he lived with his wife in the United States. In May 2015, plaintiff took the child to the United States for a vacation. Defendant maintained that she attempted to comply with the child-custody determination from April 2014 through August 2015 but that the child no longer wished to visit his father in the United States because, while the

child was there, he spent time supervised by strangers rather than with plaintiff or his new wife. Defendant stated that the "ordinary residence of the minor child is at Hyderabad and the minor child is going to stay in Hyderabad only for the future years to come." Defendant stated that it was not possible for her to go to California to seek an order modifying the child-custody determination and requested that the Family Court in Hyderabad appoint her guardian of the minor child with exclusive custody.

Defendant then submitted a request on March 10, 2016, to the Superior Court of California, County of Santa Clara, asking that court to terminate its custody jurisdiction. In a memorandum supporting her request, defendant noted that, as indicated in the child-custody determination, she and the child were now residents of India. It was her understanding that plaintiff lived in Michigan and had lived there since at least June 2015. Defendant acknowledged that under Cal Fam Code 3422(a)(2) (West, 2000)—California's codification of the UCCJEA[2]—the California court initially had continuing jurisdiction over custody matters concerning the parties' child because it properly exercised custody jurisdiction when it entered the 2014 child-custody determination. However, the continuing jurisdiction would terminate if a California court or "a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in [California]."[3] Because neither the parents nor the child resided in California, defendant requested that the California court terminate its jurisdiction over the child-custody matter.

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[2] Cal Fam Code 3400 *et seq*. (West, 2000).

[3] Cal Fam Code 3422(a)(2) (West, 2000) is substantially similar to MCL 722.1202(1)(b).

On October 15, 2016, the Family Court in Hyderabad, India, issued an order granting defendant's petition for exclusive custody of the minor child. The order noted that Hyderabad was now the only residence of defendant and the child. The Family Court noted that it had examined defendant and marked as an exhibit an order entered by the California Superior Court on October 26, 2012. The Family Court noted that it had not examined plaintiff as he "remained exparte [sic] to the proceedings" and, "[i]n the absence of any evidence to the contrary," the claims defendant made in her petition were accepted and she was granted custody of the minor child until he attained the age of majority.

On October 17, 2016, two days after the Family Court in Hyderabad granted custody to defendant, plaintiff requested that the circuit court register the 2014 child-custody determination in Michigan, pursuant to the UCCJEA. On the same day, he petitioned for enforcement of the child-custody determination. In the brief supporting the request for registration and petition for enforcement, plaintiff acknowledged that defendant had initiated a proceeding in India for guardianship of the child and that she had also filed a petition in California seeking to end the jurisdiction of the California court. According to plaintiff's brief in support of the registration request, the California court "made a 'tentative' ruling" that "it was not clear under California law whether the father's contacts with California constitute residency." The brief further indicated that the California ruling stated, " 'Whether Michigan or India has jurisdiction over custody now is for the courts in those jurisdictions to determine based on relevant laws.' "

Plaintiff contended that because he had requested registration and submitted appropriate copies of the

child-custody determination, the law was clear that the circuit court "shall" register the order and serve notice on defendant as the opposing party. His petition for enforcement did not request that the child be returned to the United States and concerned parenting time only. He did not request a modification of the 2014 child-custody determination. He maintained that the child-custody determination he sought to register in Michigan contemplated the current situation—that defendant and the child would be living in India, that plaintiff would be living in the United States and would travel back and forth to India, and that while he was in India, he would have parenting time with the child. Plaintiff requested an order that would direct the parties to abide by the terms of the child-custody determination, which he could present to defendant in India "so that she can make her personal decision as to whether she will abide by it." Plaintiff expressed his hope that defendant would "willingly cooperate with him with the knowledge that a U.S. court retains jurisdiction and expects compliance with its orders."

On February 10, 2017, the circuit court issued an order registering the California child-custody determination under MCL 722.1304 of the UCCJEA. The court also sent a notice of the registration to defendant in Hyderabad, India, on February 28, 2017.

On May 5, 2017, the court denied plaintiff's motion to enforce the child-custody determination without prejudice on the grounds that plaintiff had failed to serve defendant with the petition for enforcement, failed to assert a basis for the circuit court to exercise jurisdiction to enforce the California order, and apparently failed to present all pertinent orders regarding custody that had been entered by the California court, including the "tentative ruling" that it was not clear to

the California court that it had jurisdiction over the matter and that apparently modified the child-custody determination.

Defendant filed objections to the registration of the child-custody determination on May 16, 2017, and she requested a hearing. The circuit court held a hearing on June 27, 2017, which both parties attended telephonically from India, and at which plaintiff, but not defendant, was represented by a Michigan attorney. Plaintiff's attorney indicated a breakdown in communication between the parties and that defendant was attempting to cut off all communications between plaintiff and the child. Apparently, in response to plaintiff's request to talk to the child, defendant had told him that the Family Court in Hyderabad had granted her custody, that she was following orders given by that court, and that if plaintiff had concerns or needed clarification he should contact that court. Plaintiff's attorney contended that the Family Court in Hyderabad had not communicated with the California court where the custody order was pending when it took the case and that it therefore did not have a right under the UCCJEA to undertake any action. He also maintained that defendant's objections to registration of the California child-custody determination were untimely because she did not file her objections within 21 days of service.

The circuit court stated that service on defendant had been effectuated through the process required by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, which was through the Central Authority in India. Although the court had not received proof of service on defendant from the Central Authority, defendant had indicated that she received the documents regarding

registration in Michigan in the first week of May, and she mailed her objections on May 16. The court found that her objections were timely. The court recited the history of the case, noting that it started in California with a judgment of divorce entered on October 26, 2012, which gave the parties joint legal custody of the child and physical custody to defendant. In February 2014, the parties had stipulated to the child-custody determination, allowing the child to move to India with defendant, which the court called its "most salient feature." It also provided that plaintiff would remain in California, that any relocation would be by consent of the parties, that the California court would retain jurisdiction over custody and parenting issues, and that the United States would remain the habitual residence of the child. Despite these provisions, plaintiff moved to Michigan and in October 2016 filed a request for the 2014 California child-custody determination to be registered in Michigan under the UCCJEA. In doing so, he averred that, to the best of his knowledge and belief, the 2014 order had not been modified. On the basis of plaintiff's assertion, the court entered a notice of registration in February 2017. Plaintiff also petitioned for enforcement of the order, again indicating that the California child-custody determination had not been vacated, stayed, or modified, but acknowledging that defendant had commenced proceedings in India and had petitioned the California court to terminate its jurisdiction because plaintiff no longer lived there. Plaintiff also acknowledged a "tentative ruling" by the California court that it was not clear that he had "sufficient contact with the state of California for residency" and a statement that " 'whether Michigan or India has jurisdiction over custody now is a matter for the courts in those jurisdictions to determine based on relevant law.' "

Finally, the circuit court noted that it was "patently clear" to the court that it had "no authority and will not be able to modify or assist the parties in any way as it relates to custody or parenting time," which was "a corollary, secondary issue to registration . . . ." The court also noted plaintiff's failure to provide the documents from the Indian court that modified the California child-custody determination "violates the requirements of the UCCJEA and this Court cannot accept it." Accordingly, the court vacated its earlier registration of the California child-custody determination.

Plaintiff moved for reconsideration of this order, arguing: (1) the California court had jurisdiction to issue the stipulated child-custody determination, (2) its "tentative ruling," dated May 5, 2016, was apparently never issued as a formal order, and (3) the Family Court in Hyderabad, India could not properly modify the California order because it did not have jurisdiction under the UCCJEA to "make an 'initial custody determination' because the California court still had initial jurisdiction." Plaintiff also maintained that the Family Court in Hyderabad had apparently not even considered the 2014 order because it cited only the October 26, 2012 California divorce decree in its order giving custody to defendant. The circuit court denied defendant's motion for reconsideration, and this appeal followed.

II. STANDARD OF REVIEW

"The question whether a court has subject-matter jurisdiction to hear a particular claim is a question of law that this Court reviews de novo." *Jamil v Jahan*, 280 Mich App 92, 99-100; 760 NW2d 266 (2008). Issues regarding statutory construction are also questions of law that we review de novo. *Kar v Nanda*, 291 Mich App 284, 286; 805 NW2d 609 (2011). "However, the determination whether to exercise jurisdiction under

the UCCJEA is within the discretion of the trial court and will not be reversed absent an abuse of that discretion." *Jamil*, 280 Mich App at 100, citing *Young v Punturo (On Reconsideration)*, 270 Mich App 553, 560; 718 NW2d 366 (2006). Generally, if a trial court's decision results in an outcome within a range of principled outcomes, the court has not abused its discretion, and an appellate court should defer to the trial court's judgment. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT

A. JURISDICTION

The UCCJEA was designed, among other things, to "rectify jurisdictional issues by prioritizing home-state jurisdiction" and to "clarify the exclusive continuing jurisdiction for the state that entered the child-custody decree . . . ."[4] *Atchison v Atchison*, 256 Mich App 531, 536; 664 NW2d 249 (2003). MCL 722.1201(1) provides, in pertinent part, that a state has jurisdiction to make an initial child-custody determination in the following situations:

> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or a person acting as a parent continues to live in this state.[5]

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[4] In applying the jurisdictional requirements of the UCCJEA, "[a] court of this state shall treat a foreign country as a state of the United States . . . ." MCL 722.1105(1).

[5] MCL 722.1102(g) provides that a child's "home state" is "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding."

> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum . . . , and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.[6]

MCL 722.1202 provides that a court that has entered a prior child-custody determination consistently with the jurisdictional provisions of the UCCJEA has "exclusive, continuing jurisdiction" over the determination. This provision of the UCCJEA was specifically designed to "rectify conflicting proceedings and orders in child-custody disputes." *Atchison*, 256 Mich App at 538. Pursuant to MCL 722.1202(1), the exclusive continuing jurisdiction of a court that has issued a prior child-custody determination continues only until one of the following occurs:

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[6] The California child-custody determination discussed in this appeal was not the "initial determination." Under the UCCJEA, the "initial determination" is "the first child-custody determination concerning a particular child." MCL 722.1102(h). A "modification" under the UCCJEA is "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous child-custody determination concerning the same child, whether or not it is made by the court that made the previous child-custody determination." MCL 722.1102(k). Therefore, the 2014 order was a modification of earlier orders entered by the Superior Court of California following the parties' 2012 divorce there. Although it is possible that India entered the "initial determination" concerning the parties' child at the time of the 2011 divorce in India, the contents of that order are unknown, neither party suggests an "initial determination" regarding custody was made in India, and defendant maintains that she was not served with notice of the Indian court divorce proceedings. See MCL 722.1106; MCL 722.1108.

> (a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.
>
> (b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state.[7]

In general, a court may not modify a child-custody determination entered by a court of another state unless the court "has jurisdiction to make an initial child-custody determination under [MCL 722.1201(a) or (b)]" and either "[t]he court of the other state determines it no longer has exclusive, continuing jurisdiction under [MCL 722.1202]" or either court "determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state." MCL 722.1203.

B. REGISTRATION AND ENFORCEMENT

Under MCL 722.1304(1), child-custody determinations issued by a court in another state may be regis-

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[7] The equivalent statute in Cal Fam Code 3422(a) (West, 2000), provides that exclusive continuing jurisdiction over a child-custody determination discontinues when either of the following occurs:

> (1) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.
>
> (2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

tered in Michigan "with or without a simultaneous request for enforcement . . . ." To register a determination "means to comply with the procedures of [MCL 722.1304] to make a child-custody determination enforceable in this state." MCL 722.1102(o). To register a child-custody determination from another state, MCL 722.1304(1) requires that the person seeking registration send the following to the circuit court:

> (a) A letter or other document requesting registration.
>
> (b) Two copies, including 1 certified copy, of the child-custody determination sought to be registered, and a statement under penalty of perjury that, to the best of the knowledge and belief of the person seeking registration, the child-custody determination has not been modified.
>
> (c) Except as otherwise provided in [MCL 722.1209], the name and address of the person seeking registration and of each parent or person acting as a parent who has been awarded custody or parenting time in the child-custody determination sought to be registered.

When the circuit court has received these documents, the court must do both of the following under MCL 722.1304(2):

> (a) Cause the child-custody determination to be filed as a foreign judgment, together with 1 copy of any accompanying documents and information, regardless of form.
>
> (b) Serve notice upon the persons named under subsection (1)(c) and provide them with an opportunity to contest the registration in accordance with this section.

The notice provided to persons who have been awarded custody or parenting time in the child-custody determination is required to state all of the following:

> (a) A registered child-custody determination is enforceable as of the date of the registration in the same manner as a child-custody determination issued by a court of this state.

> (b) A hearing to contest the validity of the registered child-custody determination must be requested within 21 days after service of notice.
>
> (c) Failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that child-custody determination with respect to a matter that could have been asserted. [MCL 722.1304(3).]

Absent a timely request for a hearing to contest the registration, "the registration is confirmed as a matter of law . . . ." MCL 722.1304(5).

To successfully contest the validity of a registered custody determination, the objecting party "must request a hearing within 21 days after service of the notice under [MCL 722.1304(2)]." MCL 722.1304(4).

> At that hearing, the court *shall* confirm the registered child-custody determination unless the person contesting registration establishes one of the following:
>
> (a) The issuing court did not have jurisdiction under article 2 [of the UCCJEA].
>
> (b) The child-custody determination sought to be registered has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under article 2.
>
> (c) The person contesting registration was entitled to notice in the proceedings before the court that issued the child-custody determination for which registration is sought, but notice of those proceedings was not given in accordance with the standards of [MCL 722.1108]. [MCL 722.1304(4) (emphasis added).]

Once a foreign child-custody determination is registered, a court of this state "shall recognize and enforce," MCL 722.1305(2), the determination by "grant[ing] any relief normally available under the law of this state," MCL 722.1305(1), but "shall not modify [the order] except in accordance with" the

jurisdictional requirements of the UCCJEA found in Article 2, MCL 722.1305(2). Under MCL 722.1303(1), a "court of this state shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction that was in substantial conformity with this act or the child-custody determination was made under factual circumstances meeting the jurisdictional standards of this act *and the child-custody determination has not been modified in accordance with this act*." (Emphasis added.)

IV. ANALYSIS

We conclude that the circuit court did not abuse its discretion by entering the order vacating its registration of the California child-custody determination under the UCCJEA. The circuit court recognized the separate issues of registering the child-custody determination and having the authority to modify or enforce it. As the court acknowledged, regardless of whether the order could be registered in Michigan, the circuit court was without authority to modify it in any way. To have jurisdiction to modify the California child-custody order, the circuit court would have to find that it had the jurisdiction to make an initial child-custody determination under the UCCJEA and also either that California had determined that it no longer had exclusive, continuing jurisdiction or that Michigan or California courts had determined that neither the child nor a parent of the child resided in California. MCL 722.1203. The circuit court did not have jurisdiction to make an initial child-custody determination because, although California was no longer the child's home state, Michigan has never been the child's home state. MCL 722.1201(1)(a).

Defendant contested the registration of the California child-custody determination on the ground that it had been "vacated, stayed, or modified by a court having jurisdiction to do so" under the UCCJEA. See MCL 722.1304(4)(b). The circuit court agreed and found that the California determination had been modified by the Family Court in Hyderabad. Plaintiff argues that the court in India did not have jurisdiction to modify the California child-custody determination. However, India had become the child's home state because he lived in India with defendant, including during the six months immediately before the order granting exclusive custody to defendant was entered, he and defendant (and plaintiff) had significant connections with India, and evidence concerning the child's "care, protection, training, and personal relationships" was more likely to be found there than in any other state. MCL 722.1201(1).

Plaintiff also contends that the Family Court in Hyderabad did not have jurisdiction under the UCCJEA because it had not communicated with the Superior Court of California, where the custody matter was pending. Plaintiff is apparently referring to MCL 722.1206(1), which provides that a court may not exercise jurisdiction under the UCCJEA if "a child-custody proceeding has been commenced in a court of another state having jurisdiction substantially in conformity with [the UCCJEA]" unless that proceeding has been "terminated or is stayed by the court of the other state . . . ." Before commencing a child-custody proceeding, the second state must "examine the court documents and other information supplied by the parties," stay its proceeding if it finds that a child-custody proceeding had been commenced in another state, and communicate with the court of the other state. MCL 722.1206(2). However, "[i]n a proceeding to modify a

child-custody determination," even if a court with jurisdiction determines that "a proceeding to enforce the child-custody determination has been commenced in another state," the court may still "[p]roceed with the modification under conditions it considers appropriate." MCL 722.1206(3)(c). Accordingly, a proceeding for enforcement in another state does not necessarily terminate the jurisdiction of a court in the child's home state to modify a child-custody determination.

Furthermore, in this case, the California court had apparently determined that it no longer had exclusive, continuing jurisdiction because plaintiff's contacts with the state were no longer sufficient to constitute residency and the child resided in India with his other parent. MCL 722.1203. As the California court apparently stated, according to plaintiff, jurisdiction over the custody matter was now up to the courts in Michigan and India, the states where the child's parents reside, to decide. Although the Family Court in Hyderabad may not have exactly followed the procedures in MCL 722.1206, it was located in the child's home state of India and had jurisdiction to modify the child-custody determination.

Plaintiff also argues that the circuit court was mistaken when it gave as a ground for vacating the registration order that the issuing court lacked jurisdiction to enter the 2014 child-custody determination. When the child-custody determination was entered by the Superior Court of California in 2014, the child and his father lived in California, which at the time was the child's home state. At that time, the California court had jurisdiction under the UCCJEA to enter the child-custody determination. MCL 722.1201(1)(a); MCL 722.1202. See also Cal Fam Code 3421(a)(1) (West, 2000). For that reason, plaintiff correctly argues that

the circuit court erred by finding that one of the grounds for vacating registration was that the issuing court did not have jurisdiction under the UCCJEA.[8] However, this error was harmless because the circuit court also correctly cited as a ground for vacating its registration that the order had been modified.

Plaintiff further maintains that the Family Court in Hyderabad was not in substantial compliance with the UCCJEA and did not acquire jurisdiction because it mentioned only the original California divorce decree from 2012 and did not mention the 2014 child-custody determination that set forth terms for continuing parental contact for plaintiff. The Family Court also did not make a determination regarding whether the California court had retained jurisdiction, and the 2014 child-custody order, which modified the 2012 divorce decree, was apparently not presented to the court for registration, enforcement, or modification. Instead, the Family Court treated defendant's custody request as an initial custody determination.

The 2014 child-custody determination contemplated that defendant would be returning to India, and indeed she had left California and was living in India when the order was entered. It also contemplated that plaintiff would bring the child to defendant in India and that he would share custody if he relocated to India or exercise parenting time if he continued living in the United States. Defendant stated her intent to return to the United States as soon as possible, and the parties agreed that her relocation with the minor child to India would be temporary. Furthermore, the parties indicated their intent that the California court would

[8] This "finding" was merely a checked box on a form order and most likely was a clerical error. Significantly, defendant did not cite this ground for objecting to the registration.

retain jurisdiction over custody and visitation issues concerning their child and that jurisdiction "may only be changed by the mutual written consent of both parties specifying that the intended temporary move has become permanent." The parties agreed that neither parent would relocate to a different city without either a written agreement between the parties or further order of the court.

However, after the 2014 child-custody determination was entered in California, and after plaintiff had delivered the child to defendant in India and returned to the United States, the intent and circumstances of the parties changed. Plaintiff apparently remarried, left California, and moved to Michigan. Parenting time for plaintiff was exercised at least once in the United States in 2015 and, according to defendant, the child did not want to visit plaintiff in the United States again because the child reported being left with strangers. Subsequently, in 2016, defendant initiated a proceeding in the Family Court in Hyderabad, seeking full guardianship and exclusive custody of the child. She also requested that the Superior Court of California terminate its jurisdiction over this custody matter.

On October 15, 2016, the Family Court in Hyderabad granted defendant's petition. Although the decree and order of the Family Court does not discuss the UCCJEA or the court's jurisdiction under the statute, the order indicates that defendant was examined by the court, and she reiterated the claims she made in her petition. The petition included the facts that the child did not live in California and that neither did either of his parents. The child and defendant lived in India, and plaintiff lived in the state of Michigan. Defendant averred that the permanent residence of the child was now Hyderabad. The court also examined the

initial child-custody determination—the 2012 California divorce decree. Although the Family Court order does not mention the 2014 child-custody determination, defendant cited that order, along with four previous orders of the California court, including the 2012 divorce decree, in a list of documents that had been submitted to the court. The Family Court noted that plaintiff did not challenge defendant's evidence and did not make himself available to be questioned by the court. The court accepted defendant's claims in the absence of any contrary evidence and found that she was, therefore, entitled to the relief that she requested, which was full custody of the child.

The circuit court did not abuse its discretion by finding that the order entered by the Family Court of Hyderabad had modified the custody orders entered in the Superior Court of California. The order was "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous child-custody determination concerning the same child . . . ." MCL 722.1102(k). Although the Family Court did not specifically recognize the 2014 child-custody determination, the 2014 order was a modification of the Superior Court of California's initial 2012 order following the parties' divorce. Lacking any evidence from plaintiff, the court accepted defendant's presentation of the changed circumstances and granted her custody.

At the hearing regarding defendant's objections to registration, the circuit court noted that it had registered the California child-custody determination with the understanding that there had been no other proceedings after that date. However, the parties agreed that there had been another proceeding in India and orders had been entered. Plaintiff's statement in the

petition to register the California child-custody determination—that the determination had not been modified—was untrue. The circuit court commented that plaintiff's failure to supply the Family Court's order violated the UCCJEA and was unacceptable.

The circuit court correctly found that other orders had been entered in the child-custody matter by a court in India, the state having jurisdiction under the UCCJEA. Under the UCCJEA, the definition of "register" is "to comply with the procedures of [MCL 722.1304] to make a child-custody determination enforceable in this state." MCL 722.1102(o). The 2014 California child-custody determination was no longer enforceable because it had been modified. MCL 722.1304, which describes the process of registering a child-custody determination that had been issued by another state, also provides a process and grounds for a parent to object to the registration of a child-custody determination. Defendant timely objected on the statutory ground that the determination had been "vacated, stayed, or modified by a court having jurisdiction to do so under [the UCCJEA]." MCL 722.1304(4)(b). Therefore, the circuit court did not abuse its discretion by vacating its earlier order registering the 2014 California child-custody determination.

Affirmed.

METER and STEPHENS, JJ., concurred with JANSEN, P.J.

PEOPLE v JAMES

Docket No. 342504. Submitted October 4, 2018, at Petoskey. Decided October 11, 2018, at 9:00 a.m. Leave to appeal denied 504 Mich 900 (2019).

Joel H. James was charged in the Alpena Circuit Court with two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d, for allegedly sexually assaulting a female child while visiting Michigan in the 1990s. Defendant, a resident of Alaska, primarily worked in Alaska from the early 1990s until 2013, although he periodically returned to Alpena County, where he still owned property. Beginning in 1992, during these trips to Michigan, defendant sexually assaulted his then 11-year-old niece, and later, beginning in the early 2000s, defendant allegedly sexually assaulted his niece's minor daughter. Neither the niece nor her daughter reported the matter to authorities until 2012, and during the ensuing investigation, a third person disclosed to police that defendant sexually assaulted her multiple times in 1996 and 1997 when she was 13 and 14 years old. Defendant was extradited to Michigan in 2013 to face CSC charges involving the niece and her daughter, and in 2015, the prosecutor filed similar charges against defendant involving the third person. Defendant was bound over on the various charges. A jury subsequently found defendant not guilty on charges related to the niece's daughter, but a second jury found defendant guilty of first-degree criminal sexual conduct with regard to the niece. The jury was deadlocked on the charges involving the third person, and the prosecutor subsequently refiled a new information charging defendant with two counts of CSC-III involving the third person. Defendant moved to dismiss the refiled charges, arguing that MCL 767.24(3)(a), the statute of limitations for CSC-III in effect at the time of the alleged crime, stated that a charge had to be filed within 10 years after the offense occurred or before the alleged victim's twenty-first birthday, whichever is later, and that given the third person's age at the time of the alleged assaults, the latest periods would have expired in 2006 and 2007, well before defendant was extradited and charged with CSC-III in 2015. However, a tolling provision in effect at the time of the alleged crime, MCL 767.24(8), stated that the statutory period of limitations is effectively paused during the time the party

resides outside Michigan or is otherwise not usually and publicly residing in Michigan. Defendant argued that the tolling provision was unconstitutional as applied to him, and the court, Michael G. Mack, J., agreed with defendant, holding that the tolling provision violated defendant's right to equal protection because the tolling provision had only applied in situations in which a "suspect" was a nonresident during the limitations period and, therefore, there was no rational basis for the tolling provision to apply when no crime was reported and the party charged was not a suspect before the untolled limitations period had expired. The prosecution appealed.

The Court of Appeals *held*:

1. Under US Const, Am XIV, § 1, a person has the fundamental right to travel across the United States. In the criminal context, the right is subject to the legitimate interests of states. In this case, the tolling provision in effect at the time of the alleged crime, MCL 767.24(8), did not violate the fundamental right to travel. The provision only applies when a party is not usually and publicly residing in Michigan; therefore, it does not restrict in any way a person's right to travel within, across, or outside Michigan's borders. Additionally, the provision advances a compelling state interest in permitting later prosecutions in cases in which a defendant no longer resides in the jurisdiction.

2. Under US Const, Am XIV, § 1 and Const 1963, art 1, § 2, a person is entitled to equal protection under the law, which requires that persons be treated alike with respect to certain, largely innate, characteristics that do not justify disparate treatment. In this case, defendant argued that the tolling provision, while constitutional on its face, was unconstitutional as applied to him because he was never a suspect in a crime reported before the statutory limitations period would have run absent any tolling. To prevail on a "class of one" equal-protection challenge, a defendant must show that he or she was intentionally treated differently from others similarly situated and that there was no rational basis for the difference in treatment. To be similarly situated to an identified group, a defendant must show that he or she is comparable in all material respects to the members of that group. In this case, defendant argues that he should be compared to Michigan residents who were not identified as suspects for reported crimes within the untolled limitations periods. However, the set of similarly situated persons must be comparable to defendant in all material respects, and the most natural comparison set for defendant's claim would be those persons who do not usually and publically reside in Michigan.

The Legislature distinguishes between Michigan residents and nonresidents for purposes of tolling the statutory period of limitations for certain crimes, and because there is a material distinction between residents and nonresidents, courts have held that those two groups are not similarly situated for equal-protection purposes. Furthermore, nowhere in the tolling provision is there a requirement that "the party charged" be an actual suspect in an identified crime before the expiration of the untolled limitations period; the "party charged" simply refers to the party—in this case, defendant—who was charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply. Additionally, the state has a legitimate interest in discovering, investigating, and prosecuting previously unreported crimes. Accordingly, it was not a violation of defendant's right to equal protection to charge him with CSC-III related to alleged criminal conduct not reported until after the untolled limitations periods had expired.

Reversed and remanded.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, *K. Edward Black*, Prosecuting Attorney, *Cynthia M. Muszynski*, Assistant Prosecuting Attorney, and *Anica Letica*, Assistant Attorney General, for the people.

White Wojda and Curtis (by *Daniel W. White* and *Matthew J. Wojda*) for defendant.

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

SWARTZLE, J. If a crime occurs, but no one reports it, is it still a crime? To ask the question is to answer it. The state of Michigan has an interest in discovering previously unreported crimes, and this interest serves as a rational basis for the Legislature's tolling of the statute of limitations with respect to nonresidents charged with a crime that remained unreported until after the untolled limitations period had lapsed.

Defendant, a resident of Alaska, allegedly sexually assaulted a female minor while visiting Michigan in the 1990s. The statute of limitations periods expired in 2006 and 2007 absent any tolling, but the purported victim did not report the crime until 2012. The prosecutor charged defendant with criminal sexual conduct (CSC) III, a crime for which the statute of limitations is tolled while the person charged resides outside of Michigan. The charges were subsequently dismissed by the trial court on equal-protection grounds because, had defendant been a resident, the limitations period would have expired before the crime was reported. Finding this to be a distinction without a difference, we reverse.

I. BACKGROUND

Born in Michigan in 1955, defendant served in the military and eventually moved to Alaska. From the early 1990s until 2013, defendant worked primarily for construction companies in Alaska, although he periodically returned to Alpena County, where he still owned property. Beginning in 1992, during these trips to Michigan, defendant sexually assaulted his then 11-year-old niece, and later, beginning in the early 2000s, defendant allegedly sexually assaulted his niece's minor daughter. Neither the niece nor her daughter reported the matter to authorities until 2012, and during the ensuing investigation, a third person disclosed to police that defendant sexually assaulted her multiple times in 1996 and 1997 when she was 13 and 14 years old.

Defendant was extradited to Michigan in 2013 to face CSC charges involving the niece and her daughter, and in 2015, the prosecutor filed similar charges against defendant involving the third person. Defen-

dant was bound over on the various charges. A jury subsequently found defendant not guilty on charges related to the niece's daughter, but a second jury found defendant guilty of CSC-I with regard to the niece. The jury deadlocked on the charges involving the third person, and the prosecutor subsequently refiled a new information charging defendant with two counts of CSC-III involving this third person. The current appeal solely involves these refiled CSC-III charges.

Defendant moved to dismiss the refiled charges based on the statute of limitations. The statute of limitations for CSC-III in effect at the time stated that a charge had to be filed within 10 years after the offense occurred or before the alleged victim's twenty-first birthday, whichever is later. MCL 767.24(3)(a).[1] Given the person's age at the time of the alleged assaults, the latest periods would have expired in 2006 and 2007, well before defendant was extradited and charged with CSC-III in 2015. Yet, the Legislature also included a tolling provision applicable to any limitations period that had not yet expired: "Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed." MCL 767.24(8).[2] In other words, the statute of limitations period is effectively "paused" during the time the party resides outside of Michigan or is other-

[1] MCL 767.24 has been amended several times since the charges in this case were filed. Most recently, MCL 767.24 was amended to provide that a charge involving a minor victim of third-degree sexual assault has to be filed "within 15 years after the offense is committed or by the alleged victim's twenty-eighth birthday, whichever is later." MCL 767.24(4)(a), as amended by 2018 PA 182. Because defendant was charged in 2015 with committing the instant offenses, however, the 2018 amendment is inapplicable to this case.

[2] "An out-of-state tolling provision has been part of MCL 767.24 for the entire time frame captured by this case." *People v Kasben*, 324 Mich

wise "not usually and publicly" residing in this state. There is no question that defendant "did not usually and publicly reside" in Michigan from at least the 1990s until 2013, so if the tolling provision applies, the 10-year limitations periods on the CSC-III charges would not have lapsed by the time defendant was charged.

In his motion, defendant argued that the tolling provision was unconstitutional as applied to him, both under the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment. The trial court agreed with defendant, reasoning that "the tolling provision seems to have only been applied in limited situations where a *suspect* was a nonresident during the limitations period." The trial court could find "no rational basis for the tolling provision" to apply when no crime was reported and the party charged was not a suspect before the untolled limitations period had expired. Concluding that the tolling provision violated defendant's right to equal protection, the trial court dismissed the CSC-III charges.

This appeal followed.

II. ANALYSIS

There are two issues on appeal—does the tolling provision in MCL 767.24 violate defendant's constitutional right to interstate travel or his right to equal protection under the law? While defendant argues that these are fact-based inquiries, the pertinent facts are not in doubt. Accordingly, with respect to the constitu-

App 1, 4 n 2; 919 NW2d 463 (2018). The out-of-state tolling provision codified in MCL 767.24(8) at the time the charges were filed in this case is now codified at MCL 767.24(11).

tional and statutory issues applicable here, we review them de novo. *People v Harris*, 499 Mich 332, 342; 885 NW2d 832 (2016).

A. TOLLING A LIMITATIONS PERIOD DOES NOT VIOLATE THE RIGHT TO TRAVEL

We begin with defendant's argument that the tolling provision violates his constitutional right to travel. Under the federal Fourteenth Amendment's Privileges and Immunities Clause, a person has the fundamental right to travel across the United States. US Const, Am XIV, § 1; *Jones v Helms*, 452 US 412, 418; 101 S Ct 2434; 69 L Ed 2d 118 (1981). This fundamental right is not without qualification, and, in the criminal context, the right is subject to the legitimate interests of states. See *Jones*, 452 US at 419.

We find little merit in defendant's argument. The tolling provision here only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's borders. Although the provision does create a negative *consequence* for someone who resides outside of Michigan and becomes a suspect in a crime that occurred within the state, this Court has already held that "the tolling provision advances a compelling state interest in permitting later prosecutions in cases where a defendant no longer resides in the jurisdiction." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008); cf. *Commonwealth v Lightman*, 339 Pa Super 359, 372; 489 A2d 200 (1985) (Spaeth, P.J., concurring and writing for the majority) (holding that "appellant's right to travel was qualified, if at all, not by an arbitrary distinction drawn by the government,

but by his own criminal conduct"). Although *Crear* was subsequently overruled on other grounds and therefore the decision is not binding, *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262; 657 NW2d 153 (2002); MCR 7.215(J)(1), we agree with its analysis and come to the same conclusion—the tolling provision of MCL 767.24 does not violate the right to travel found in the Privileges and Immunities Clause of the Fourteenth Amendment.

B. THE TOLLING PROVISION DOES NOT VIOLATE EQUAL PROTECTION

This leaves us to consider defendant's primary claim before the trial court and now on appeal—whether defendant's "rights as a 'class of one' under the equal protection clause of both the Michigan and United States Constitutions are violated through the application of the nonresident tolling provision." The scope of Michigan's Equal Protection Clause is coextensive with that of its federal counterpart, so the provisions will be considered together in analyzing defendant's claim. Const 1963, art 1, § 2; US Const, Am XIV, § 1; see *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). In essence, equal protection requires that persons be treated alike with respect to "certain, largely innate, characteristics that do not justify disparate treatment." *Crego*, 463 Mich at 258.

Defendant concedes that the tolling provision is constitutional on its face, but he argues that the provision is unconstitutional as applied to him because he was never a suspect in a crime reported before the statute of limitations period would have run absent any tolling. Only after the untolled limitations periods would have lapsed did the women come forward and report that they had been sexually assaulted by defen-

dant years before. If he had been a resident[3] throughout this period, then the limitations periods would have expired in 2006 and 2007 before any sexual assault was reported or he had become a suspect, and, as a result, he would now be beyond prosecution. To apply the tolling provision in this case would be to treat him unequally to those residents who are similarly situated, according to defendant.

Defendant presents his claim as an as-applied, "class of one" equal-protection challenge.[4] To prevail on the claim, defendant must show both that (1) he "has been intentionally treated differently from others similarly situated," and (2) "there is no rational basis for the difference in treatment." *Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). To be similarly situated to an identified group, defendant must show that he is comparable in all material respects to the members of that group. If he cannot establish that he was treated unequally in some material way, then there is no violation of equal protection. *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013).

As for the rational-basis inquiry, it is a highly deferential one. Defendant must negate "every conceiv-

[3] As noted, the tolling provision applies to those who did "not usually and publicly reside" in Michigan, MCL 767.24(8), and this encompasses more than just those who did not physically reside in the state. For our purposes, we will refer to the distinction between "residents" and "nonresidents," but the latter term should be understood to include those who physically lived in Michigan, though not "customarily and openly." *Kasben*, 324 Mich App at 9 (cleaned up).

[4] A "facial" challenge and an "as-applied" challenge can share some overlapping features. As the Sixth Circuit observed in *Green Party of Tennessee v Hargett*, 791 F3d 684, 692 (CA 6, 2015), an as-applied claim "can challenge more than just the plaintiff's particular case without seeking to strike the law in all its applications." If successful, then defendant's legal position would presumably apply to all nonresidents who were charged under similar factual circumstances.

able reason for the government's actions" or show "that the actions were motivated by animus or ill-will." *Loesel v Frankenmuth*, 692 F3d 452, 462 (CA 6, 2012) (cleaned up). With respect to a claim based on legislation, the Legislature need not have actually articulated a particular rationale, and it is sufficient if the Court can identify an interest that may have reasonably been the rationale. *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 561-562; 629 NW2d 402 (2001). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with mathematical nicety, or even whether it results in some inequity when put into practice." *Crego*, 463 Mich at 260 (cleaned up). Given this, there is a strong presumption that the statute is constitutional. *People v Conat*, 238 Mich App 134, 154; 605 NW2d 49 (1999).

Nonresidents Are Not Similarly Situated to Residents. As explained, defendant argues that he should be compared to Michigan residents who were not identified as suspects for reported crimes within the untolled limitations periods. Had defendant been a resident, the limitations periods would not have been tolled, the periods would have expired in 2006 and 2007, and he would have been immune from prosecution. But because he was a nonresident, he was extradited and charged with CSC-III. Defendant contrasts this purportedly similarly situated group with those persons (resident or not) who were identified as suspects in reported crimes prior to the expiration of the untolled limitations periods.

There is, however, a flaw in defendant's argument. The set of similarly situated persons must be comparable to defendant in all material aspects. On its face, the tolling provision applies to all persons who commit

a crime in Michigan and then no longer reside usually and publicly in the state. MCL 767.24(8). Following this, the most natural comparison set for defendant's claim would be those persons who do not usually and publicly reside here. See, e.g., *State v March*, 395 SW3d 738, 788 (Tenn Crim App, 2011) ("The tolling statute on its face applies equally to all persons who commit a crime in this State and then depart.").

Defendant disagrees and instead compares himself to residents. Yet, with respect to a state's police power, there is a material distinction between someone who resides within the state and someone who does not. A state's power to investigate and prosecute a person is severely diminished when that person does not reside within its borders. State and local law enforcement resources are not infinite, and such resources will often be insufficient to investigate, question, or prosecute someone who resides in a different state. See *Burns v Lafler*, 328 F Supp 2d 711, 721 (ED Mich, 2004). Choices need to be made about how best to allocate finite law enforcement resources, and rarely will those resources best be used pursuing out-of-state persons. Moreover, as laboratories for public policy, other states may not share Michigan's priorities with respect to criminal law, and a case that is important in this state may receive less attention from authorities in another state. See *State v Sher*, 149 Wis 2d 1, 14; 437 NW2d 878 (1989). For these and other reasons, courts have held that residents and nonresidents are not similarly situated for equal-protection purposes. See, e.g., *Burns*, 328 F Supp 2d at 721 (collecting cases).

The State Has an Interest in Discovering Previously Unreported Crimes. Defendant rejoins that his situation is factually distinguishable from *Burns* and similar cases, because in each of those cases there was at

least a crime reported, if not a suspect identified, within the untolled limitations period. According to defendant, the state has no legitimate interest in tolling a limitations period for which there has not been a crime reported or suspect identified. As he sums up in his brief, "there was no 'victim' to protect or for whom to seek justice because none had come forward" and "the State has absolutely no interest in distinguishing between residents and nonresidents for purposes of a purely hypothetical future claim."

Defendant's position is without support in law or reason. With respect to law, nowhere in the statute is there a requirement that "the party charged" has to have been an actual suspect in an identified crime prior to the expiration of the untolled limitations period. The term "party charged" simply refers to the party, here defendant, who was charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply. There is no qualification placed on the "party charged" for the tolling provision to apply other than that the party must not have "usually and publicly reside[d] within this state." We will not read into the statute a term that the Legislature did not put there. *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 557; 912 NW2d 593 (2018).

Similarly, the authority that the trial court relied upon for the proposition that, for the tolling provision to apply, defendant must have been a "suspect" or an "accused" prior to the expiration of the untolled limitations period, is inapposite. See *Crear*, 242 Mich App 158; *People v McIntire*, 232 Mich App 71; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999); OAG, 1928-1930, p 582 (September 16, 1929). While these authorities do indeed use terms such as "suspect" and "accused," in none of these cases was the

court or attorney general faced with the question presented here. It is clear that the terms were used in those cases merely as generic descriptions, not as specific limitations on who may be subject to tolling while residing out of state.

With respect to reason, we point out the obvious—an unreported crime is still a *crime*, and the victim of an unreported crime is still a *victim*. There may be any number of reasons why a crime is not initially reported, including a victim's age, vulnerability, or fear, or the lack of corroborating witnesses or physical evidence. The state certainly has an interest in discovering previously unreported crimes, as well as subsequently investigating and prosecuting them. Cf. *March*, 395 SW3d at 787 (holding that "the State's interest in *detecting* crime and punishing offenders is compelling") (emphasis added); *Sher*, 149 Wis 2d at 16 (observing that the "statute is substantially related to the state's interests in the *detection* of crimes, and the identification and apprehension of criminals") (emphasis added); *Scherling v Superior Court of Santa Clara Co*, 22 Cal 3d 493, 503; 585 P2d 219 (1978) (concluding that "the Legislature could have determined that the *detection* of the crime and identification of the criminal are more likely if the criminal remains in the state than if he departs") (emphasis added).

Moreover, it is certainly conceivable that an unreported crime will more likely be discovered when the guilty party resides within the state where the crime occurred. A chance encounter between the guilty party and the victim, a casual conversation between the guilty party and someone with knowledge of the victim or circumstances, or a relatively minor traffic infraction leading to a confession, are just several circumstances in which residing in the same state where the

crime occurred could increase the chance of local law enforcement discovering an unreported crime. Proximity often leads to discovery.

Defendant is correct that a "purely hypothetical" criminal act cannot serve as a rational basis for distinguishing between residents and nonresidents. Yet, the prosecutor's case here does not rest on a "purely hypothetical" claim. Rather, the prosecutor presented sufficient evidence to establish that there was probable cause to believe that defendant sexually assaulted the complainant. Whether the passage of time or delay in reporting undermines the prosecutor's case is a question for the jury, not for this Court on appeal.

Finally, we do recognize that there is some tension between applying the tolling provision in this case and the general interests served by a statute of limitations. As explained by the federal Supreme Court, "Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v United States*, 397 US 112, 114-115; 90 S Ct 858; 25 L Ed 2d 156 (1970). By tolling the limitations period for nonresidents in cases like this one, there is an increased risk that basic facts might become obscured with the passage of time. Yet, this is an increased risk faced in *all* situations involving nonresidents. In the face of this risk, the Legislature has seen fit to draw a distinction between residents and nonresidents and, for the reasons set forth earlier, it had a rational basis for doing so. As there is no suggestion that the Legislature or prosecutor was motivated by animus or ill-will, defendant's as-applied, "class of one" equal-protection claim must fail.

III. CONCLUSION

The Legislature distinguishes between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes. There are rational grounds for doing so, including the investigation, prosecution, and, indeed, the very discovery of previously unreported crimes. Given this, it is not a violation of defendant's right to interstate travel or equal protection to charge him with CSC-III related to alleged criminal conduct not reported until after the untolled limitations periods had expired. Accordingly, we reverse the trial court and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURPHY, P.J., and SAWYER, J., concurred with SWARTZLE, J.

NORCZYK ESTATE v DANEK

Docket No. 339713. Submitted October 2, 2018, at Marquette. Decided October 16, 2018, at 9:00 a.m.

Stephanie Pantti, as personal representative of the estate of Anthony Norczyk, brought a medical malpractice action in the Marquette Circuit Court against Kyle Danek, DDS; Michigan Community Dental Clinics, Inc.; Nelson Gencheff, D.O.; and DLP Marquette General Hospital, LLC, alleging negligence and breach of duty during events preceding Norczyk's death. Norczyk died following a series of complications after having all of his teeth removed. Before his death, Norczyk was taken to Marquette General Hospital, where Gencheff, a board-certified cardiologist and interventional cardiologist, was consulted and provided recommendations concerning Norczyk's medical treatment. Plaintiff's complaint alleged that Gencheff was negligent and breached the duty owed to Norczyk in several ways, including by failing to provide immediate and prompt cardiology care, failing to recognize that Norczyk exhibited signs of acute coronary syndrome (ACS) requiring immediate cardiac treatment, failing to promptly pursue a cardiac catheterization and initiate an optimal plan of revascularization upon recognition of ACS, and failing to prevent further harm to Norczyk. Plaintiff supported the complaint with an affidavit of merit executed by Dr. Joshua Furman, a board-certified cardiologist. Defendants moved for summary disposition, arguing that because Furman was only a board-certified cardiologist and not a specialist in interventional cardiology, he was not a qualified expert for purposes of the affidavit of merit. The court, Jennifer A. Mazzuchi, J., denied the motion, reasoning that because Gencheff's role as a general, on-call cardiologist was the most relevant specialty at the time, Furman was a qualified expert for purposes of the affidavit of merit. Gencheff and Marquette General Hospital appealed.

The Court of Appeals *held*:

MCL 600.2912d(1) requires a plaintiff alleging a claim of medical malpractice to file with the complaint an affidavit of merit signed by a health professional whom the plaintiff's attorney reasonably believes meets the requirements for an expert

witness under MCL 600.2169. Under MCL 600.2169(1)(a), if a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice. Furthermore, under MCL 600.2169(1)(a), a proposed expert witness must hold the same board certification as the party against whom the testimony is offered. However, the Supreme Court in *Woodard v Custer*, 476 Mich 545 (2006), held that although specialties and board certificates must match, not *all* specialties and board certificates must match; because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, MCL 600.2169(1) does not require that the witness specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify. Accordingly, the plaintiff's expert only has to match the one most relevant specialty, which is the specialty engaged in by the defendant physician during the course of the alleged malpractice. In this case, both Gencheff and Furman were board-certified cardiologists. However, Gencheff held a certificate indicating that he completed a fellowship in advanced interventional cardiovascular disease, whereas Furman did not hold such a certificate. This distinction was relevant only if, at the time of the alleged malpractice, Gencheff was practicing interventional cardiology. At the time of the alleged malpractice, Gencheff was practicing as a general cardiologist, not an interventional cardiologist. An interventional cardiologist is permitted or authorized to perform invasive procedures to address cardiac issues, whereas a general cardiologist engages in the practice of diagnosing, evaluating, and assessing cardiac problems but cannot perform invasive procedures. Gencheff had been the on-call cardiologist at the time of the alleged malpractice, and plaintiff alleged that Gencheff failed to make decisions and take necessary actions during his evaluation and assessment of Norczyk. Accordingly, the one most relevant specialty that Gencheff engaged in at the time of the alleged malpractice was general cardiology, not interventional cardiology, because the allegations of medical malpractice did not pertain to negligence in the performance of invasive procedures but instead concerned failures by Gencheff to act relative to Norczyk's care and treatment during his assessment and evaluation of Norczyk. The trial court correctly determined that Furman's affidavit of merit submitted on behalf of plaintiff satisfied the requirements of MCL 600.2912d and MCL 600.2169.

Affirmed.

Petrucelli & Waara, PC (by *Jonny L. Waara*) for Stephanie Pantti, as personal representative of the estate of Anthony Norczyk.

Corbet, Shaw, Essad, & Bonasso, PLLC (by *Daniel R. Corbet*, *Kenneth A. Willis*, and *Erika Jost*) for Nelson Gencheff, D.O., and DLP Marquette General Hospital, LLC.

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

MURPHY, P.J. In this medical malpractice action, defendants-appellants, Nelson Gencheff, D.O., and DLP Marquette General Hospital, LLC, appeal by leave granted[1] the trial court's order denying their motion for summary disposition. The motion was pursued on the basis that plaintiff's affidavit of merit was defective because it was executed by a physician who was unqualified to render an expert opinion on the applicable standard of care. For the reasons stated in this opinion and pursuant to our Supreme Court's opinion in *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), we affirm.

Plaintiff's decedent, Anthony Norczyk, died in May 2014 following a series of complications after having all of his teeth extracted. Prior to his death, Norczyk was taken to Marquette General Hospital, where Gencheff, a board-certified cardiologist and interventional cardiologist, was consulted and provided recommendations concerning Norczyk's medical treatment. Plaintiff's complaint alleged that Gencheff was negligent and breached the duty owed to Norczyk in several ways, including by failing to provide immediate and prompt

[1] *Norczyk Estate v Danek*, unpublished order of the Court of Appeals, entered February 28, 2018 (Docket No. 339713).

cardiology care, failing to recognize that Norczyk exhibited signs of acute coronary syndrome (ACS) requiring immediate cardiac treatment, failing to promptly pursue a cardiac catheterization and initiate an optimal plan of revascularization upon recognition of ACS, and failing to prevent further harm to Norczyk. Plaintiff supported the complaint with an affidavit of merit executed by Dr. Joshua Furman, a board-certified cardiologist.

Defendants filed a motion for summary disposition, arguing that because Furman was only a board-certified cardiologist and not a specialist in interventional cardiology, he was not a qualified expert for purposes of the affidavit of merit. The trial court denied defendants' motion, reasoning as follows:

> The Court is persuaded by Plaintiff's argument. Plaintiff's complaint makes a variety of allegations about Dr. Gencheff's failure to act. Though the timing of the catheterization is one of those allegations, the dominant feature of Plaintiff's claims is the timeliness of response in general. As Dr. Gencheff responded to a call from the emergency room, it appears that his role as a general, on-call cardiologist was the most relevant specialty at the time.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Additionally, this case involves the interpretation and application of MCL 600.2169, along with Furman's qualifications as an expert, and in *Woodard*, 476 Mich at 557, our Supreme Court observed:

> These cases . . . involve the interpretation of MCL 600.2169(1). This Court reviews questions of statutory interpretation de novo. However, this Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion. An

> abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. [Citations omitted.]

MCL 600.2912d(1) requires a plaintiff alleging a claim of medical malpractice to "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." And MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

With respect to the construction of MCL 600.2169(1)(a), the Supreme Court in *Woodard*, 476 Mich at 558-559, explained:

> Although specialties and board certificates must match, not *all* specialties and board certificates must match. Rather, § 2169(1) states that "a person shall not give expert testimony on the *appropriate* standard of practice or care unless . . . ." (Emphasis added.) That is, § 2169(1) addresses the necessary qualifications of an expert witness to testify regarding the "*appropriate* standard of practice or care," not regarding an inappropriate or irrelevant standard of medical practice or care. Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or

> care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify. . . .
>
> Further, § 2169(1) refers to "the same specialty" and "that specialty." It does not refer to "the same specialties" and "those specialties." That is, § 2169(1) requires the matching of a singular specialty, not multiple specialties.

Under MCL 600.2169(1)(a), "if a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice." *Woodard*, 476 Mich at 560-561. And "if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." *Id*. at 562. Furthermore, under MCL 600.2169(1)(a), a proposed expert witness must hold the same board certification as the party against whom the testimony is offered. *Id*. at 562-563. Moreover, "if a defendant physician has received a certificate of special qualifications, the plaintiff's expert witness must have obtained the same certificate of special qualifications in order to be qualified to testify under § 2169(1)(a)." *Id*. at 565. However, "the plaintiff's expert does not have to match all of the defendant physician's specialties; rather, the plaintiff's expert only has to match *the one most relevant specialty*." *Id*. at 567-568 (emphasis added). The one most relevant specialty is "the specialty engaged in by the defendant physician during the course of the alleged malpractice . . . ." *Id*. at 560. This applies equally for subspecialties. *Id*. at 566 n 12.

Woodard addressed two cases. In the first, the defendant was board certified and specialized in pediatric

critical care medicine. *Id*. at 575. The plaintiffs' expert was board certified in pediatrics but did not specialize in pediatric critical care medicine. *Id*. at 554-555. The plaintiffs' claim was based on the alleged improper placement of an arterial line and a venous catheter in an infant's legs while the infant was a patient in the pediatric intensive care unit. *Id*. at 554. The Supreme Court indicated that there was no dispute that the infant was critically ill when the procedures were performed. *Id*. at 575. The Court concluded "that the trial court did not abuse its discretion in finding that the defendant physician was practicing pediatric critical care medicine at the time of the alleged malpractice, and, thus, pediatric critical care medicine [was] the one most relevant specialty." *Id*. at 576. Accordingly, the plaintiffs' proposed expert, who did not specialize in pediatric critical care medicine, was unqualified to testify and could not satisfy the requirements of MCL 600.2169(1)(a). *Id*.

In the second case, the defendant physician was board certified, and he specialized in general internal medicine and was practicing in that specialty at the time of the alleged malpractice. *Id*. at 556, 577-578. The plaintiff's proposed expert was also board certified in general internal medicine, but he devoted a majority of his professional time to treating infectious diseases, which is a subspecialty of internal medicine. *Id*. at 556. Accordingly, the plaintiff's proposed expert was unqualified to give testimony for purposes of MCL 600.2169(1). *Id*. at 578.

In the instant case, it is undisputed that Gencheff and Furman are both board-certified cardiologists. However, Gencheff holds a certificate indicating that he completed a fellowship in advanced interventional cardiovascular disease. Furman does not hold such a

certificate. This certificate distinguishes the two physicians, although that distinction is relevant only if, at the time of the alleged malpractice, Gencheff was practicing interventional cardiology, making that the one most relevant specialty.

In the lower court, the parties did not dispute that Gencheff was first consulted about Norczyk's medical care after Norczyk arrived at the emergency room while Gencheff was on call. Plaintiff argued that during this initial consultation, in a general, on-call-cardiologist capacity, Gencheff failed to make decisions and take actions necessary for Norczyk's well-being relative to the functioning of his heart. Accordingly, plaintiff argued in the trial court, and continues to argue on appeal, that the one most relevant specialty was that of a general, on-call cardiologist. In support of this argument, Furman executed an affidavit, separate from his affidavit of merit, indicating that he had been called upon to make decisions in similar situations within his role as a general cardiologist.[2] Defendants argued that the one most relevant specialty was that of an interventional cardiologist because only an interventional cardiologist can perform cardiac catheterizations, the procedure that plaintiff alleged was not undertaken on a timely basis. Defendants did not submit an affidavit from Gencheff, let alone one in which he asserted that he was engaged in interven-

[2] In Furman's affidavit of merit, he averred:

> Under the circumstances existing in this case, Dr. Gencheff was required to promptly attend to Mr. Norczyk when called by Dr. Mackey, especially given his abnormal EKG upon presentation and his excessive bleeding from the dental procedure on Dual Antiplatelet therapy, realizing Mr. Norczyk was at high risk for a coronary event. When confronted with a high probability of Acute Coronary Syndrome, Dr. Gencheff should have immediately created a plan for revascularization, in addition to optimal Medical therapy.

tional cardiology with respect to his consultation and assessment of Norczyk before performing the catherization. Nor did defendants explain the difference between the practice of cardiology and the practice of interventional cardiology in the context of the circumstances of this case.

Attached to defendants' motion for summary disposition was a document prepared by the American College of Physicians that described the discipline of interventional cardiology, which stated:

> Interventional Cardiology represents advanced training in cardiovascular disease and focuses on *the invasive (usually catheter-based) management of heart disease*.
>
> Clinical issues usually managed by interventional cardiologists include:
>
> - Ischemic heart disease (percutaneous coronary intervention [angioplasty], stent placement, coronary thrombectomy)[;]
> - Valve disease (valvuloplasty, percutaneous valve repair or replacement)[; and]
> - Congenital heart abnormalities (repair of atrial and ventricular septal defects, closure of patent ductus arteriosus angioplasty of the great vessels)[.] [Emphasis added.]

In Furman's affidavit that was submitted for purposes of responding to defendants' motion for summary disposition, the doctor stated:

> 3. At the time that Nelson Gencheff, D.O., was consulted by Elizabeth Mackey, D.O., he was being consulted in the standard role of a board-certified cardiologist who was on call for cardiac consultations for patients presenting to the emergency room. I have served as a board-certified cardiologist under the same and similar circumstances throughout my years as a physician.

* * *

> 8. I have been consulted on patients in my capacity as a board certified cardiologist while on call countless times throughout my career. During all of these consultations, which are similar to the facts and circumstances present in the underlying lawsuit, I was qualified to act in my capacity as a board certified cardiologist, and my role under those situations did not involve the practice of interventional cardiology.

In a snippet from a deposition given by Furman in unrelated litigation, which was attached to defendants' motion for summary disposition, Furman testified that he engaged in the practice of diagnostic or "[n]oninvasive cardiology." In a deposition given by Gencheff in an unrelated case, Gencheff testified:

> I care for acutely ill patients that have coronary artery disease. I also work as a non-interventional cardiologist where I'm involved in interpreting tests—non-invasive tests in patients. I take care of heart failure. I manage lipids. I'm part of a research consortium here.

The documentary evidence makes quite clear that the difference between a cardiologist and an interventional cardiologist is that the latter is permitted or authorized to perform invasive procedures to address cardiac issues, whereas a general cardiologist engages in the practice of diagnosing, evaluating, and assessing cardiac problems but cannot perform invasive procedures.[3] We conclude that the one most relevant specialty here is cardiology, not interventional cardiology, because the allegations of medical malpractice do not pertain to negligence in the performance of invasive procedures but instead concern failures by Gencheff to

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[3] In *Baqir v Principi*, 434 F3d 733, 735 (CA 4, 2006), the United States Court of Appeals for the Fourth Circuit noted that interventional cardiology entails "performing invasive procedures such as catheterizations to treat blockages in coronary arteries with balloons, stents, and cutting devices."

act relative to Norczyk's care and treatment, falling outside of and not encompassed by the performance of invasive procedures.

Defendants' position is built almost entirely on the proposition that, because plaintiff alleges that Gencheff was negligent in not timely performing a catheterization, and because only an interventional cardiologist can perform a catheterization, Gencheff was practicing interventional cardiology during the relevant time frame. We disagree with defendants' logic; nothing in the record suggests that a general cardiologist is not just as capable as an interventional cardiologist in assessing a patient's need for a catheterization or other invasive procedure. We find it quite telling that defendants did not produce an affidavit or deposition testimony by Gencheff himself wherein he claims that he was practicing interventional cardiology, as opposed to general cardiology, with respect to Norczyk's care prior to invasive procedures being employed. And Furman's summary-disposition affidavit averred that Gencheff "was being consulted in the standard role of a board-certified cardiologist who was on call for cardiac consultations for patients presenting to the emergency room." In sum, we agree with the trial court's determination that Furman's affidavit of merit submitted on behalf of plaintiff satisfied the requirements of MCL 600.2912d and MCL 600.2169 because the one most relevant specialty was cardiology, not interventional cardiology. Reversal is unwarranted.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

SAWYER and SWARTZLE, JJ., concurred with MURPHY, P.J.

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID v MICHIGAN

Docket No. 343801. Submitted August 7, 2018, at Lansing. Decided October 16, 2018, at 9:05 a.m. Leave to appeal sought.

The Council of Organizations and Others for Education About Parochiaid, the American Civil Liberties Union of Michigan, and others brought an action in the Court of Claims against the Governor and others, challenging the constitutionality of MCL 388.1752b, as amended by 2017 PA 108, and seeking to enjoin defendants from distributing under MCL 388.1752b appropriated funds to reimburse nonpublic schools for certain costs. Plaintiffs asserted that MCL 388.1752b violated Article 4, § 30 and Article 8, § 2 of Michigan's 1963 Constitution because the statute allocates money from the state's general fund to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a state law or administrative rule. Plaintiffs and defendants both moved for summary disposition. The court, CYNTHIA D. STEPHENS, J., concluded that plaintiffs had standing to file suit because they had an interest that was substantial and distinct from the citizenry at large. The court granted plaintiffs' motion for summary disposition, concluding that MCL 388.1752b violated Article 8, § 2 because it authorized the payment of public monies to aid or maintain nonpublic schools and to support the employment of persons at nonpublic schools. The court declared the entire statute unconstitutional and enjoined defendants from distributing any funds under the statute; the court did not address plaintiffs' argument under Article 4, § 30. Defendants appealed.

The Court of Appeals *held*:

1. A litigant may have standing if the litigant has a special injury or right, or a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. MCL 600.2041(3) provides that an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic nonprofit corporation organized for

civic, protective, or improvement purposes. MCR 2.201(B)(4)(a) similarly provides that an action to prevent illegal expenditures of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes. Because plaintiffs were domestic nonprofit corporations, they had standing under MCR 2.201(B)(4)(a) and MCL 600.2041(3) to challenge the constitutionality of MCL 388.1752b on the basis that the statute allegedly provides for the illegal expenditure of state funds. Accordingly, the Court of Claims correctly determined that plaintiffs had standing.

2. When interpreting the Constitution, courts must effectuate the intent of the people who adopted it. For a statute to be facially unconstitutional, it must be established that no set of circumstances exists under which the statute would be constitutionally valid; if any factual situation can be conceived that would sustain a statute, the existence of that situation at the time the statute was enacted must be assumed.

3. Article 8, § 2 provides that the Legislature shall maintain and support a system of free public elementary and secondary schools as defined by law and that every school district must provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin. In 1970, Article 8, § 2 was amended by Proposal C through a voter initiative to address direct financial aid to nonpublic schools, also known as "parochiaid." As a result, Article 8, § 2 also provides that no public monies or property may be appropriated or paid or any public credit utilized by the Legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denomination or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant, or loan of public monies or property may be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school; however, the Legislature may provide for the transportation of students to and from any school. Given the Supreme Court's construction of Article 8, § 2 in *Traverse City Sch Dist v Attorney General*, 384 Mich 390 (1971), and *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41 (1975), the provision prohibits state funding of purchased educational services in the nonpublic school when the hiring and control is in the hands of the nonpublic school, and it prohibits shared-time instruction that is merely incidental or casual or noninstructional in character. In addition,

the provision does not prohibit auxiliary services and drivers training because they are general health or welfare measures that have only an incidental relation to the instruction of nonpublic school children. In other words, the Article 8, § 2 prohibition against allocating public monies to directly or indirectly aid a nonpublic school precludes allocating those monies for educational or instructional purposes but does not preclude allocating the monies for health, safety, or welfare purposes that are noninstructional in nature; that is, the constitutional provision forbids aid that is a primary element of the support and maintenance of a nonpublic school but permits aid that is only incidental to a nonpublic school's support and maintenance. In accordance with the principles and framework established by the Supreme Court in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*, such reimbursement may only occur if the action or performance needed to comply with a health, safety, or welfare mandate (1) is, at most, merely incidental to teaching and providing educational services to nonpublic school students, (2) does not constitute a primary function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement.

4. Under MCL 388.1752b(1), general fund money is allocated to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a state law or administrative rule. MCL 333.1752b(7) provides that the appropriated funds are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in MCL 388.1752b. MCL 388.1752b(8) provides that the funds allocated under the statute are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student. MCL 388.1752b(9) defines the term "actual cost" as the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a state law or administrative rule identified by the Department of Education and is to be calculated in accordance with the form published by the department. Under MCL 388.1752b(10), the costs associated with a nonpublic school taking daily student

attendance and training fees, inspection fees, and criminal-background-check fees are an actual cost for purposes of complying with a health, safety, or welfare requirement under a state law or administrative rule.

5. MCL 388.1752b(2), (3), (9), and (10) authorize reimbursements to nonpublic schools for the actual costs associated with criminal-background-check fees, the disposal of instruments containing mercury, and maintaining two epinephrine autoinjectors. The costs allowed under the statute were incidental to teaching and to providing educational services to nonpublic school students, did not constitute a primary function or element necessary for a nonpublic school's existence, operation, and survival, and did not involve or result in excessive religious entanglement; instead, the costs were for the purposes of protecting the health and welfare of students, which is allowed under Article 8, § 2. Accordingly, because the statute contains provisions under which the statute would be constitutionally valid, the statute was not facially unconstitutional. The MCL 388.1752b(9) definition of "actual cost"—the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a state law or administrative rule—did not violate Article 8, § 2 because the reimbursable costs under MCL 388.1752b(2), (3), (9), and (10) involved the health, safety, or welfare of schoolchildren, were merely incidental to providing educational services, and were noninstructional in nature; that is, an employee performing those tasks would not be engaged in employment for educational purposes at that time, even if the rest of the employee's workday was spent educating or instructing students, for which there was no reimbursement. For that reason, the Court of Claims erred by concluding that because the statute mandates those actions, the actions could not be deemed incidental to the education of nonpublic school children. A state-law mandate on an issue concerning the health, safety, or welfare of students is almost by definition incidental to teaching and providing education services; further, because the state controls the actions necessary to comply with the law, nonpublic schools do not have control over the mandates. The Court of Claims erred by concluding that MCL 388.1572b was unconstitutional and by granting summary disposition in favor of plaintiffs.

Affirmed in part, reversed in part, and remanded for further proceedings.

GLEICHER, J., concurring in part and dissenting in part, agreed with the majority that plaintiffs had standing under MCL 600.2041(3) but disagreed with its conclusion that MCL 388.1752b

does not violate Article 8, § 2 of Michigan's 1963 Constitution. The constitutional provision clearly forbids, directly or indirectly, publicly funded financial aid payments to nonpublic schools, and the statute opened the door to direct payments to nonpublic schools, which would improperly help those schools do business as private institutions. The majority's three-part test of its own making ignored the constitutional text and imposed a judicial gloss that contradicted the will of the people who voted for Proposal C and the clear words of the provision itself. The majority erred by relying on two phrases loosely derived from *Traverse City School Dist*, that is, "incidental aid" and "primary function." Instead, the majority should have focused on the clear language of Article 8, § 2 and the Court's evaluation of that provision in *Traverse City Sch Dist*, specifically, the underlying tenets of the provision and the Court's review of services that survived the provision's amendment, none of which involved the direct payment of public funds to nonpublic schools, which was at issue in this case. In addition, the shared-time and auxiliary services approved by the *Traverse City Sch Dist* Court were profoundly different from the direct allocation of funds allowed under MCL 388.1752b; the Court expressly drew a constitutional line between services provided to nonpublic school students funded by public dollars, which are forbidden under Article 8, § 2, and those services offered to nonpublic school students but funded entirely through payments to public schools, which are allowed by the constitutional provision. The "primary function" aspect of the majority's test was not supported by precedent. For example, because criminal background checks of school personnel are statutorily mandated under MCL 388.1752b(9), they are a primary element necessary for a school's operation but are not incidental to a school's existence. The majority failed to explain how its interpretation was consistent with the clear language of Article 8, § 2 and the ratifiers' intent to halt parochiaid. The correct inquiry should be whether the reimbursement of state mandates constitutes direct or indirect aid to a nonpublic school. A direct payment to a nonpublic school intended to offset the costs of doing business is aid, a payment, a subsidy, and a grant in direct contravention of Article 8, § 2. In that way, MCL 388.1752b violated Article 8, § 2 because it appropriates public funds that are directly paid to nonpublic schools. *Traverse City Sch Dist* and its progeny did not prohibit only expenditures that directly aid a nonpublic school's educational programs. MCL 388.1752b clearly created a means for direct wage reimbursement, contrary to the Article 8, § 2 clause forbidding any subsidies that support employment at a nonpublic school. Judge GLEICHER would have affirmed the opinion and order of the Court of Claims.

STATUTES — STATE SCHOOL AID ACT — NONPUBLIC SCHOOLS — REIMBURSEMENTS — COMPLIANCE WITH HEALTH, SAFETY, OR WELFARE REQUIREMENTS — CONSTITUTIONALITY.

To comply with Article 8, § 2 of the 1963 Michigan Constitution, state-funded reimbursements to nonpublic schools may only occur if the action or performance needed to comply with a health, safety, or welfare mandate (1) is, at most, merely incidental to teaching and providing educational services to nonpublic school students, (2) does not constitute a primary function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement.

White Schneider PC (by *Jeffrey S. Donahue* and *Andrew J. Gordon*) for the Council of Organizations and Others for Education about Parochiaid.

Daniel S. Korobkin, *Kristin Totten*, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union of Michigan, Michigan Parents for Schools, and 482Forward.

Dickinson Wright PLLC (by *Peter H. Ellsworth*, *Brandon C. Hubbard*, *Phillip J. DeRosier*, and *Ariana D. Pellegrino*) for the Michigan Association of School Boards, the Michigan Association of School Administrators, the Michigan Association of Intermediate School Administrators, the Michigan School Business Officials, the Michigan Association of Secondary School Principals, the Middle Cities Education Association, the Michigan Elementary and Middle School Principals Association, Kalamazoo Public Schools, and Kalamazoo Public Schools Board of Education.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Jonathan S. Ludwig*, Assistant Attorney General, for Michigan, the Governor, the Department of Education, and the Superintendent of Public Instruction.

Amici Curiae:

Paul, Weiss, Rifkind, Wharton & Garrison, LLP (by *Lynn B. Bayard*, *Sara E. Hershman*, and *Sarah K. Weber*) and *Salvatore Prescott & Porter, PLLC* (by *Jennifer B. Salvatore*) for the Education Law Center.

Dykema Gossett PLLC (by *Lori McAllister*, *Leonard C. Wolfe*, and *Courtney F. Kissel*) for the Michigan Catholic Conference and the Michigan Association of Non-Public Schools.

Before: MURPHY, P.J., and GLEICHER and LETICA, JJ.

MURPHY, P.J. In this appeal, we are called upon to judge whether MCL 388.1752b, which allocates money from the state's general fund "to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state," MCL 388.1752b(1), violates Const 1963, art 8, § 2, which addresses the topic of education and prohibits the Legislature from appropriating public monies to aid nonpublic schools. On the strength of the Michigan Supreme Court's construction of Const 1963, art 8, § 2, in *Traverse City Sch Dist v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971), and *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975), we hold that, without offending Const 1963, art 8, § 2, the Legislature may allocate public funds to reimburse nonpublic schools for actual costs incurred in complying with state health, safety, and welfare laws. But the reimbursement may only occur if the action or performance that must be undertaken to comply with a health, safety, or welfare mandate (1) is, at most, merely *incidental* to teaching and providing educational services to nonpublic school

students (noninstructional in nature), (2) does not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement. As we will elaborate upon later in this opinion, fitting cleanly within these criteria, as but one example, is a nonpublic school's payment to cover "criminal background check fees," which are identified in MCL 388.1752b(10) as reimbursable actual costs. The Court of Claims ruled, effectively, that MCL 388.1752b is unconstitutional on its face, meaning that under no set of circumstances is the statute constitutionally sound in relation to Const 1963, art 8, § 2. Given our example to the contrary, we reverse the ruling of the Court of Claims and remand for an examination, under the proper criteria outlined herein, of each of the "actual costs" for which a nonpublic school may be reimbursed under the challenged legislation. Furthermore, the Court of Claims, in light of its ruling, declined to address plaintiffs' contention that MCL 388.1752b also violates Const 1963, art 4, § 30, which provides that "[t]he assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes." This constitutional challenge must also be entertained by the Court of Claims on remand.

I. BACKGROUND

A. MCL 388.1752b

The statute at issue, MCL 388.1752b, was first enacted by the Legislature pursuant to 2016 PA 249 and made effective October 1, 2016. Pursuant to 2017 PA 108, the Legislature amended MCL 388.1752b, effective July 14, 2017, making some substantive

changes to the statute. The amended version of the statute[1] allocates general fund money "to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). With respect to the Legislature's characterization of the appropriated funds, they "are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section." MCL 388.1752b(7). Additionally, the funds allocated under the statute "are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student." MCL 388.1752b(8).

The Department of Education (DOE) is tasked with publishing "a form for reporting actual costs incurred by a nonpublic school in complying with a health, safety, or welfare requirement mandated under state law containing each health, safety, or welfare requirement mandated by a law or administrative rule of this state applicable to a nonpublic school and with a reference to each relevant provision of law or admin-

[1] We note that the Legislature again amended MCL 388.1752b pursuant to 2018 PA 265, effective June 28, 2018. However, the new changes, which only concern some dollar figures, the alteration of applicable fiscal years, and the carrying over of unexpended funds from previous years, do not affect our resolution of the issues in this case.

istrative rule for the requirement." MCL 388.1752b(2).[2] And "a nonpublic school seeking reimbursement for actual costs incurred in complying with a health, safety, or welfare requirement under a law or administrative rule of this state" must timely submit a completed reporting form published by the DOE.

[2] The current reimbursement form encompasses mandates on the following subjects: hazardous chemicals, MCL 29.5p; fire and tornado drills, MCL 29.19; inspections of certain motor vehicles by state police, MCL 257.715a; pupil transportation, MCL 257.1807 to MCL 257.1873; food law, MCL 289.1101 to MCL 289.8111; pesticide application, MCL 324.8316; concussion education, MCL 333.9155 and MCL 333.9156; immunizations, MCL 333.9208; licensure of school speech pathologists, MCL 333.17609; release of information to parent covered by personal protection order, MCL 380.1137a; immunization statements and vision screening, MCL 380.1177 and MCL 380.1177a; inhalers and epinephrine autoinjectors, MCL 380.1179 and MCL 380.1179a; criminal background checks, MCL 380.1230 to MCL 380.1230h; noncertified teachers and counselors, MCL 380.1233; products containing mercury, MCL 380.1274b; teacher certification and administrator certificates, MCL 380.1531 to MCL 380.1538; convicted persons holding board approval, MCL 380.1539b; compulsory school attendance, MCL 380.1561; attendance records, MCL 380.1578; postsecondary enrollment options, MCL 388.514; postsecondary enrollment information and counseling, MCL 388.519 and MCL 388.520; private, denominational, and parochial schools, MCL 388.551 to MCL 388.557; school building construction, MCL 388.851 to MCL 388.855b; federal asbestos building regulations, MCL 388.863; career and technical prep programs and enrollment, 388.1904; career and technical prep information and counseling, MCL 388.1909 and MCL 388.1910; playground equipment safety, MCL 408.681 to MCL 408.687; youth employment standards and permits, MCL 409.104 to MCL 409.106; childcare organization criminal history and background checks, MCL 722.115c; child-protection laws, MCL 722.621 to MCL 722.638; annual school bus inspections, Mich Admin Code, R 257.955; pesticide use, Mich Admin Code, R 285.637; food establishment manager certification, Mich Admin Code, R 289.570.1 to Mich Admin Code, R 289.570.6; bloodborne pathogens, Mich Admin Code, R 325.70001 to Mich Admin Code, R 325.70018; auxiliary services notification, Mich Admin Code, R 340.293; boarding school requirements, Mich Admin Code, R 340.484; emergency-situation permits, Mich Admin Code, R 390.1145; mentor teachers for noncertified instructors, Mich Admin Code, R 390.1146; and school counselor certification, Mich Admin Code, R 390.1147.

MCL 388.1752b(3). "The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state." MCL 388.1752b(4). The DOE is then directed to distribute funds to each of the nonpublic schools that timely submitted a completed form. *Id*. And with respect to actual costs, MCL 388.1752b(9) provides:

> For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state identified by the department . . . and is to be calculated in accordance with the form published by the department . . . , which shall include a detailed itemization of costs. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing a specific task regardless of whether that individual is available and regardless of who actually performs a specific task. Labor costs under this subsection shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. When calculating costs . . . , fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.

The statute particularly identifies a few costs that qualify as "actual costs" subject to reimbursement, providing that "the actual cost incurred by a nonpublic school for taking daily student attendance shall be considered an actual cost in complying with a health, safety, or welfare requirement under a law or adminis-

trative rule of this state." MCL 388.1752b(10). Further, "[t]raining fees, inspection fees, and criminal background check fees are considered actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state." *Id*.

B. LITIGATION IN THE COURT OF CLAIMS

The case has a fairly lengthy history in the Court of Claims, as well as in this Court. We, however, need not explore the history in any great detail, as much of it is not relevant for purposes of resolving this appeal. In March 2017, plaintiffs filed their original complaint, challenging the constitutionality of MCL 388.1752b under Const 1963, art 4, § 30 and Const 1963, art 8, § 2 and seeking various forms of equitable relief. In June 2017, plaintiffs filed a first amended complaint and later filed a second amended complaint in April 2018,[3] with plaintiffs continuing to challenge the statute's constitutionality under the two constitutional provisions. Ultimately, the Court of Claims was faced with competing motions for summary disposition filed by the parties. In a written opinion and order, the Court of Claims granted plaintiffs' motion for summary disposition under MCR 2.116(C)(10) and denied defendants' motion.

The Court of Claims first rejected defendants' argument that plaintiffs lacked standing to file suit, determining that plaintiffs had an interest that was substantial and distinct from the citizenry at large, considering that the disbursement of public funds to nonpublic schools would result in a diversion of those funds away from the coffers of Michigan public schools. Turning to the substantive issue, the Court of Claims

[3] Hereafter, we shall simply refer to the "amended complaint."

ruled that MCL 388.1752b violates Const 1963, art 8, § 2 because it authorizes the payment of public monies to aid or maintain nonpublic schools and to support the employment of persons at nonpublic schools. The Court of Claims struck down the entire statute and any and all possible disbursements no matter their nature, effectively declaring MCL 388.1752b facially unconstitutional. We shall delve into the particulars and reasoning behind the decision of the Court of Claims in our analysis. In light of the constitutional violation, the Court of Claims enjoined and restrained defendants from distributing any funds under the statute. Finally, the Court of Claims explained that, given its ruling, it was unnecessary to address plaintiffs' argument under Const 1963, art 4, § 30. Defendants appeal as of right.

II. ANALYSIS

A. STANDING

Defendants initially argue that plaintiffs lacked standing to bring suit, contending that they "did not demonstrate that they have a special injury, right, or substantial interest that would be detrimentally affected in a manner different from the citizenry at large, so their constitutional challenge should be dismissed." Accordingly, defendants maintain that the Court of Claims erred by denying their motion for summary disposition. We review de novo a trial court's ruling on a motion for summary disposition, as well as whether a party has standing to file suit. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011).

In plaintiffs' amended complaint, they specifically alleged that they had standing under MCL 600.2041(3), MCR 2.201(B)(4), and *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686

(2010). MCL 600.2041(3) provides, in pertinent part, that "an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes . . . ." Similarly, MCR 2.201(B)(4)(a)—crafted by our Supreme Court—provides that "[a]n action to prevent illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought . . . in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes . . . ." (Formatting altered.) The instant litigation filed by plaintiffs is indisputably an action seeking to prevent the alleged illegal expenditure of state funds, testing the constitutionality of MCL 388.1752b. And defendants do not assert that any particular plaintiff is not a domestic nonprofit corporation that was organized for civic, protective, or improvement purposes.[4]

In *Lansing Sch Ed Ass'n*, 487 Mich at 372, the Supreme Court held that "[a] litigant may have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large *or if the statutory scheme implies that the Legislature intended to confer standing on the litigant*." (Emphasis added.) MCL 600.2041(3) does more than imply an intent by the Legislature to confer standing on domestic nonprofit corporations that seek to challenge the

[4] The allegations in the amended complaint specifically identified the first four listed plaintiffs as being domestic nonprofit corporations organized for civic, protective, or improvement purposes. While perhaps there is an argument that the remaining plaintiffs do not fall within the parameters of MCL 600.2041(3) and MCR 2.201(B)(4)(a), defendants have chosen not to pursue that argument.

constitutionality of a statute that allegedly provides for the illegal expenditure of state funds; it expressly declares that intent. Accordingly, plaintiffs have standing to pursue their constitutional claims.

Defendants, citing *Mich Ed Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 11-12; 724 NW2d 478 (2006), maintain that MCL 600.2041(3) and MCR 2.201(B)(4)(a) cannot supplant plaintiffs' constitutional obligation to show a special injury, right, or interest that is distinct from the general public. This argument ignores the change in Michigan jurisprudence regarding standing that occurred in 2010 with the issuance of *Lansing Sch Ed Ass'n*. In *Mich Ed Ass'n*, 272 Mich App at 12, this Court, relying on *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), and *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), held "that to the extent that MCL 600.2041(3) and MCR 2.201(B)(4) confer standing broader than the limits imposed by Michigan's constitution, as determined by *Lee* and *Nat'l Wildlife*, MCL 600.2041(3) and MCR 2.201(B)(4) are unconstitutional." However, in *Lansing Sch Ed Ass'n*, 487 Mich at 352-353, our Supreme Court reversed course, stating:

> We hold that the standing doctrine adopted in *Lee* . . . , and extended in later cases, such as *Nat'l Wildlife* . . . , lacks a basis in the Michigan Constitution and is inconsistent with Michigan's historical approach to standing. Therefore, we overrule *Lee* and its progeny and hold that Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan's long-standing historical approach to standing.

Mich Ed Ass'n, being a progeny of *Lee*, was effectively overruled by the Supreme Court in *Lansing Sch Ed Ass'n*. In sum, plaintiffs have standing under MCL

600.2041(3), MCR 2.201(B)(4)(a), and *Lansing Sch Ed Ass'n*, as alleged in their amended complaint. We therefore affirm the ruling of the Court of Claims on the issue of standing, albeit for different reasons. See *Burise v City of Pontiac*, 282 Mich App 646, 647; 766 NW2d 311 (2009). We now address the substantive constitutional issue.[5]

B. CONSTITUTIONALITY OF THE STATUTE

1. UNDERLYING PRINCIPLES

" 'Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011), quoting *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). The power to declare a statute unconstitutional must be exercised with extreme caution. *In re Request for Advisory Opinion*, 490 Mich at 307-308. "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it

[5] In a motion for peremptory reversal, defendants argued that plaintiffs failed to verify their original complaint as required by MCL 600.6431(1), rendering the complaint fatally defective, and that the defect could not be cured by the amended complaint, which was verified. This panel denied the motion for peremptory reversal. *Council of Organizations & Others for Ed v Michigan*, unpublished order of the Court of Appeals, entered August 1, 2018 (Docket No. 343801). Defendants did not include their peremptory reversal argument in their brief on appeal, which only included the standing issue and the substantive issue regarding the constitutionality of MCL 388.1752b. And defendants have not sought to amend or supplement their appellate brief to add the issue raised in the motion for peremptory reversal. Accordingly, we need not further address the argument given the denial of the motion.

violates some provision of the Constitution that a court will refuse to sustain its validity." *Id*. at 308 (quotation marks and citation omitted). The party challenging the constitutionality of a statutory provision has the burden to prove that it is unconstitutional. *Id*. We do not inquire into the wisdom of legislation when contemplating whether a statute is unconstitutional. *Id*.

With respect to whether a statutory provision is *facially* unconstitutional, as noted by the Court of Claims in this case, it must be established that no set of circumstances exists under which the statute would be constitutionally valid. *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998); *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997) (MALLETT, C.J.); *id*. at 602 (BOYLE, J., dissenting). Indeed, if any factual situation can be conceived that would sustain a statute, the existence of that situation at the time of the statute's enactment must be assumed. *Council of Organizations & Others*, 455 Mich at 568-569 (opinion of the Court).[6]

When reviewing and interpreting the Michigan Constitution, our objective is to effectuate the intent of the people who adopted it. *In re Request for Advisory Opinion*, 490 Mich at 309. "The lodestar principle is that of 'common understanding,' the sense of the words used that would have been most obvious to those who voted to adopt the constitution." *Id*. (some quotation marks and citations omitted). The construction that

[6] "An as-applied challenge, to be distinguished from a facial challenge, alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (quotation marks and citation omitted). In plaintiffs' amended complaint, they alleged that MCL 388.1752b "is unconstitutional on its face, or alternatively as applied . . . ."

should be given to a constitutional provision is the one that reasonable minds, i.e., the great mass of the people, would give the provision. *Council of Organizations & Others*, 455 Mich at 569 (opinion of the Court).

2. CONST 1963, ART 8, § 2 (PROPOSAL C) AND *TRAVERSE CITY SCH DIST*

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Const 1963, art 8, § 1. In regard to Const 1963, art 8, § 2, the first paragraph provides:

> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

Originally, this paragraph constituted the full extent of Const 1963, art 8, § 2. See *Traverse City Sch Dist*, 384 Mich at 404. As the result of a referendum on Proposal C in November 1970, the following language was added as a second paragraph to Const 1963, art 8, § 2:[7]

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered

[7] See *Traverse City Sch Dist*, 384 Mich at 404.

> in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

We initially note that in *Traverse City Sch Dist*, 384 Mich at 415, our Supreme Court struck down as "unconstitutional, void and unenforceable" the following portion of the second sentence of Proposal C: "or at any location or institution where instruction is offered in whole or in part to such nonpublic school students." The Court held, however, that "[t]he remainder of Proposal C's language . . . raises no questions of unconstitutionality under the Michigan or the United States Constitutions." *Id*. at 436. Therefore, the unconstitutional portion of Proposal C was severable and removable without altering the purpose and effect of the balance of Proposal C. *Id*. at 415.

Importantly, with respect to the construction of Proposal C overall, the Michigan Supreme Court in *Traverse City Sch Dist* determined that its language, "read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, prohibits the purchase, with public funds, of *educational services* from a nonpublic school." *Id*. at 406-407 (emphasis added). The Court examined a wide variety of issues that had arisen from the adoption of Proposal C, reaching the following pertinent conclusions:

> 1. Proposal C above all else prohibits state funding of purchased educational services in the nonpublic school where the hiring and control is in the hands of the nonpublic school, otherwise known as "parochiaid." . . .
>
> 2. Proposal C has no prohibitory impact upon shared time instruction wherever offered provided that the ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system authorities and the courses are open to all eligible

> to attend the public school, *or absent such public school standards, when the shared time instruction is merely "incidental" or "casual" or non-instructional in character, subject, of course, to the issue of religious entanglement*. . . .[8]
>
> 3. Proposal C does not prohibit auxiliary services and drivers training, which are general health and safety services, wherever these services are offered except in those unlikely circumstances of religious entanglement. [*Id*. at 435 (emphasis added).][9]

The Supreme Court provided the following reasoning in support of these conclusions regarding Proposal C:

> The prohibitions of Proposal C have no impact upon auxiliary services. Since auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children. They are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children, or they treat physical and mental deficiencies of school children so that such children can learn like their normal peers. Consequently, the prohibitions of Proposal C which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children.
>
> In addition auxiliary services are similar to shared time instruction in that private schools exercise no control

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[8] The Court earlier explained that "shared time" means "an operation whereby the public school district makes available courses in its general curriculum to both public and nonpublic school students normally on the premises of the public school." *Id*. at 411 n 3.

[9] The Court identified "auxiliary services" according to a statutory provision, indicating that such services include, in part, special education, health, nursing, street crossing guard, and speech correction services. *Id*. at 417-418, quoting MCL 340.622, repealed by 1976 PA 451.

> over them. They are performed by public employees under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school.
>
> However, we must voice one caveat and that is the possibility of excessive entanglement between church and state when auxiliary services are offered at the private school. Since auxiliary services are general health and safety measures rather than instructional measures, the possibility of excessive involvement of the state in religious affairs is, of course, at most, minimal. [*Id*. at 419-420.]

According to the Court, "it is clear that health and safety measures only incidentally benefit religion and do not constitute state support of or excessive entanglement in religion." *Id*. at 435 n 22. The Court's emphasis on distinguishing general health and safety services from instructional or educational services for purposes of analyzing whether there is a violation of Proposal C was further reflected when the Court stated that it did "not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities." *Id*. at 420. The Court further indicated that because "the employment stricture [of Proposal C] is a part of the educational article of the constitution, we construe it to mean *employment for educational purposes only*." *Id*. at 421 (emphasis added). This construction of Proposal C lends strong support for defendants' position that the bar to allocating public monies to directly or indirectly aid a nonpublic school only serves to preclude such aid if designated for educational or instructional purposes, not health, safety, and welfare purposes that are noninstructional in nature.

3. *ADVISORY OPINION RE CONSTITUTIONALITY OF 1974 PA 242*

In *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48-49, 50-51, our Supreme Court held that the delivery of school supplies and textbooks by the state to students attending nonpublic schools violated Const 1963, art 8, § 2, as construed in *Traverse City Sch Dist*. Joined by three other justices of the Court to form a majority, Justice SWAINSON, after examining *Traverse City Sch Dist*, observed and held:

> In my opinion the Court reached correct conclusions in the Traverse City School District case because the services examined therein were properly classified as "incidental" to a private school's establishment and existence. Such programs as shared time and auxiliary services, to be sure, do help a private school compete in today's harsh economic climate; but, they are not "primary" elements necessary for the school's survival as an educational institution. These incidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C.
>
> A very different situation is presented, I find, in the case of the textbooks and supplies that would be made available to private schools under [the statute]. When we speak of textbooks and supplies we are no longer describing commodities "incidental" to a school's maintenance and support. Textbooks and supplies are essential aids that constitute a "primary" feature of the educational process and a "primary" element required for any school to exist. I quote from *Bond v Ann Arbor School Dist*, 383 Mich 693, 702; 178 NW2d 484; 41 ALR3d 742 (1970):
>
> > Applying either the "necessary elements of any school's activity" test or the "integral fundamental part of the elementary and secondary education" test, it is clear that books and school supplies are an essential part of a system of free public elementary and secondary schools.

> However Proposal C is to be construed, I believe that if the will of the electorate is to be respected it must be read to bar public funding for primary and essential elements of a private school's existence. [*Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48-49 (citation omitted).]

There are two important footnotes in *Advisory Opinion re Constitutionality of 1974 PA 242* that need to be taken into consideration. First, the Court noted that the statute at issue provided that school supplies and textbooks were to be extended to all school-age children, but "[i]n reality, and for the purposes of constitutional analysis, [the statute] provides the aid to the private schools." *Id*. at 49 n 4. This was a recognition that the state was attempting to provide direct aid to nonpublic schools. Second, Justice SWAINSON noted that "[s]ince Proposal C speaks broadly in terms of the support and maintenance of all private schools, I think it is a proper interpretation of the *Traverse City School Dist* . . . rule to state that Proposal C forbids aid that is a 'primary element' of the support and maintenance of a private school *but permits aid that is only 'incidental' to the private school's support and maintenance*." *Id*. at 48 n 2 (emphasis added). Accordingly, when interpreting or divining a rule from *Traverse City Sch Dist*, we cannot ignore the fact that the majority in *Advisory Opinion re Constitutionality of 1974 PA 242* has already done so.[10]

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[10] We recognize that "an advisory opinion does not constitute a decision of the [Supreme] Court and is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 461 n 1; 208 NW2d 469 (1973). "[T]he constitutional provision authorizing advisory opinions was not intended to encroach upon the right of the people to an adjudicative determination of their particularized claims of unconstitutionality." *Id*. at 462 n 1. An advisory opinion "constitutes the opinion of the several justices signatory based upon the bare words of

4. DISCUSSION AND RESOLUTION

The interpretation and constitutionality of a statute present issues of law that are reviewed de novo on appeal. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). The language of Const 1963, art 8, § 2 must ultimately be viewed through the lens of the Supreme Court's opinions in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*. Taking into consideration the Supreme Court's construction of Proposal C in these two cases, we hold that, without offending Const 1963, art 8, § 2 (Proposal C), the Legislature may allocate public funds to reimburse nonpublic schools for actual costs incurred in complying with state health, safety, and welfare laws. But the reimbursement may only occur if the action or performance that must be undertaken in order to comply with a health, safety, or welfare mandate (1) is, at most, merely *incidental* to teaching and providing educational services to nonpublic school students (noninstructional in nature), (2) does not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement.

Consistently with these criteria, and as observed earlier, the Supreme Court in *Traverse City Sch Dist*, 384 Mich at 406-407, concluded that Proposal C pro-

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the act and unadorned by any facts or combination of facts[;] [i]t is no more." *Id*. It would thus seem fitting, especially in the context of a "facial" challenge regarding the constitutionality of a statute, to, at a minimum, give great weight to that part of an advisory opinion that construes the underlying constitutional language and creates the constitutional framework within which a statute is examined. Moreover, we believe that it should be left to the Michigan Supreme Court to revisit any prior advisory opinion regarding the proper construction of Proposal C, instead of having this Court question the wisdom of earlier interpretations.

hibits the allocation of public funds for use at nonpublic schools in relation to "educational services." We also note a discussion by the Supreme Court in *Traverse City Sch Dist*, *id*. at 420, in which the Court stated that "auxiliary services are general health and safety measures," that the Legislature has statutory authority to define a service as an "auxiliary service," and that, despite this authority, the Legislature does not have "a blank check to make any service a health and safety measure outside the reach of Proposal C simply by calling it an auxiliary service." The undeniable point that flows from this discussion is that *true* health and safety measures fall outside the reach of Proposal C.

We conclude that the language utilized by the Legislature in MCL 388.1752b is generally consistent with the construction of Const 1963, art 8, § 2 by the Supreme Court in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*, which plainly was the legislative goal in crafting the statute. Moreover, what is ultimately relevant is not the descriptive words used by the Legislature in characterizing the reimbursable costs, but whether the reimbursable costs actually authorized under the statute offend Proposal C, as construed by our Supreme Court.[11] Again, the Court of Claims concluded that

[11] In other words, merely because the Legislature describes appropriated funds as covering costs that are "incidental to the operation of a nonpublic school," MCL 388.1752b(7), does not make it so for purposes of determining the constitutionality of the statute. This would be akin to the Legislature expressly proclaiming in a statute that it is constitutional. For this very reason, the Court of Claims made much to-do about nothing in supporting its decision by observing that the Legislature stated, in part, that the appropriated funds "are for purposes related to education." MCL 388.1752b(7). First, this provision is not inconsistent with our incidental-to-education analysis; the Legislature did not state that the funds are for purposes "of" education. Second, the Legislature immediately followed the phrase with the descriptive "incidental" lan-

MCL 388.1752b is facially unconstitutional, so if even one factual scenario exists under which the statute could be applied in harmony with Const 1963, art 8, § 2, reversal would be warranted. *Council of Organizations & Others*, 455 Mich at 568-569. There is no need to go any further than MCL 388.1752b itself and subsection (10), which, designating it as an "actual cost," authorizes an allocation to reimburse a nonpublic school for payments made to cover "criminal background check fees." Such actual costs incurred by a nonpublic school are for the purpose of ensuring and advancing the safety and welfare of its students by weeding out prospective teachers and other school personnel who might pose a risk of harm to students. The criminal background checks are mandated by state law. MCL 380.1230[12] and MCL 380.1230a. Conducting criminal background checks is merely inciden-

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guage. *Id*. Third, regardless of the legislative label and to our point, each reimbursable cost has to be particularly examined to determine whether it covers activities that are incidental to the education of students and the operation of a nonpublic school, constituting true health, safety, or welfare measures. See *Traverse City Sch Dist*, 384 Mich at 420 (stating that the Legislature does not have free rein to make any measure a health and safety measure in order to avoid Proposal C simply by defining it as such).

[12] MCL 380.1230(1) provides:

> Except as otherwise provided in this section, upon an offer of initial employment being made by the board of a school district or intermediate school district or the governing body of a public school academy or *nonpublic school* to an individual for any full-time or part-time employment or when school officials learn that an individual is being assigned to regularly and continuously work under contract in any of its schools, the district, public school academy, or nonpublic school shall request from the criminal records division of the department of state police a criminal history check on the individual and, before employing the individual as a regular employee or allowing the individual to regularly and continuously work under contract in any of its schools, shall have received from the department of state police the report described in subsection (8). [Emphasis added.]

tal to teaching and providing educational services to nonpublic school students (noninstructional in nature); it does not constitute a primary function or element necessary for a nonpublic school's existence, operation, and survival, and it does not involve or result in excessive religious entanglement. Accordingly, any determination that MCL 388.1752b is facially unconstitutional is rejected.

Reimbursement for payments made to cover criminal-background-check fees is not an anomaly. For example, MCL 388.1752b[13] provides authority for reimbursement of actual costs associated with disposing of instruments containing mercury. These actual costs incurred by a nonpublic school are for the purpose of protecting the health and welfare of its students, removing a hazard that could seriously jeopardize the health of a student. Disposing of instruments containing mercury located in a nonpublic school is merely incidental to teaching and providing educational services to nonpublic school students (noninstructional in nature); it does not constitute a primary function or element necessary for a nonpublic school's existence, operation, and survival, and it does not involve or result in excessive religious entanglement.

In another example, MCL 388.1752b(2) and (9) provide authority to allocate public funds to reimburse a nonpublic school for actual costs incurred in maintaining "2 epinephrine auto-injectors" in the school as

[13] MCL 380.1274b(3) provides:

> The board of a school district, local act school district, or intermediate school district; *governing board of a nonpublic school*; or board of directors of a public school academy shall ensure that the school district, intermediate school district, *nonpublic school*, or public school academy disposes of mercury and instruments containing mercury in accordance with applicable state and federal law. [Emphasis added.]

mandated by MCL 380.1179a(2). Such actual costs sustained by a nonpublic school are for the purpose of safeguarding the health and welfare of its students, allowing for the quick access and use of the device to treat an emergency situation involving a student who is suffering an anaphylactic reaction. Maintaining epinephrine autoinjectors in a nonpublic school is merely incidental to teaching and providing educational services to nonpublic school students (noninstructional in nature); it does not constitute a primary function or element necessary for a nonpublic school's existence, operation, and survival, and it does not involve or result in excessive religious entanglement.

We must speak to the definition of "actual cost" found in MCL 388.1752b(9), which provides, in part, that it "means the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state identified by the department . . . ." Const 1963, art 8, § 2 prohibits any payment, directly or indirectly, to support "the employment of any person at any . . . nonpublic school . . . ." At first glance, the definition of "actual cost" appears to run afoul of Proposal C. Staying with the three examples, if an employee of a nonpublic school is tasked with preparing paperwork for submission to authorities as part of a criminal background check, tasked with locating and disposing of instruments containing mercury, or tasked with obtaining and maintaining epinephrine autoinjectors, payment of public funds to reimburse the nonpublic school for wages related to the work performed by the employee would appear to be a payment to support the employment of a nonpublic school employee. The Court of Claims rendered such a finding. However, the tasks being performed are for the health, safety, or welfare of

schoolchildren and are merely incidental to providing educational services to the students; the tasks are noninstructional in nature. Accordingly, there is no violation of Proposal C. Our conclusion is buttressed by language in *Traverse City Sch Dist*, 384 Mich at 421, wherein the Court conveyed that because "the employment stricture [of Proposal C] is a part of the educational article of the constitution, we construe it to mean *employment for educational purposes only*." (Emphasis added.) When a nonpublic school employee is performing a health, safety, or welfare task mandated by law, he or she is not engaged in employment for educational purposes at that time, even if the remainder of that employee's workday is spent on educating or instructing students, for which there is no reimbursement. Public funds, therefore, are not aiding a person's employment as a teacher or educator at a nonpublic school.

The Court of Claims posited that because the purpose of MCL 388.1752b is to reimburse nonpublic schools for the cost of actions *mandated* by law, the actions involved cannot be deemed incidental to the education of nonpublic school children or the operation of the school, but instead concern primary functions or elements necessary for a school's survival. We disagree. A state-law mandate on an issue concerning the *health, safety, or welfare* of a student almost by definition is "incidental" to teaching and providing educational services to a student. Indeed, the Supreme Court in *Traverse City Sch Dist*, 384 Mich at 419, stated that because "auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children," and "[t]hey are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children . . . ."

Conducting criminal background checks, disposing of instruments containing mercury, and maintaining epinephrine autoinjectors, while mandatory, have nothing directly to do with teaching and educating students; these compliance actions are truly incidental to providing educational services and focus instead on a student's well-being, i.e., his or her health, safety, and welfare. Moreover, conducting criminal background checks, disposing of instruments containing mercury, and maintaining epinephrine autoinjectors are plainly not *primary* elements or functions necessary for a nonpublic school's operation, but are simply incidental to the school's operation. While textbooks and school supplies plainly and undoubtedly "constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist," *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 49, we fail to see how conducting background checks, disposing of instruments containing mercury, or maintaining epinephrine autoinjectors equates to supplying school books used to teach and educate students on a daily basis; any comparison is strained and unreasonable.

Additionally, the Court of Claims indicated that state or public school control over such matters as shared-time and auxiliary services is paramount to finding constitutional compliance and that MCL 388.1752b gives complete control to nonpublic schools. We disagree with this view and reasoning on two bases. First, considering the nature or character of the health, safety, and welfare laws at issue, the state, and not a nonpublic school, is effectively dictating and controlling the action or performance needed to comply with the law. Again staying with the three examples, and not foreclosing the possibility that the analysis may be different with respect to other mandates, there

is little, if any, discretion or independent control that a nonpublic school can exercise when engaged in conducting criminal background checks, disposing of instruments containing mercury, and procuring epinephrine autoinjectors; colloquially speaking, you just do it as demanded by state statute or administrative rule. Second, the Supreme Court, as quoted earlier, stated that "Proposal C has no prohibitory impact upon shared time instruction wherever offered provided that the ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system authorities and the courses are open to all eligible to attend the public school, *or absent such public school standards*, *when the shared time instruction is merely 'incidental' or 'casual' or noninstructional in character . . . .*" *Traverse City Sch Dist*, 384 Mich at 435 (emphasis added). The emphasized language reflects the proposition, which runs deeply through *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*, that Proposal C was intended to prohibit the funding of educational services, not the funding of services that are merely incidental to teaching and providing educational services and operating a school, i.e., noninstructional in nature. *Advisory Opinion re Constitutionality of 1974 PA 242*, *id*. at 49 ("[I]ncidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C."); *Traverse City Sch Dist*, 384 Mich at 419 ("The prohibitions of Proposal C have no impact upon . . . health and welfare measures, [because] they have only an incidental relation to the instruction of private school children.").

The Court of Claims determined that the "shared time" and auxiliary services approved in *Traverse City Sch Dist* do not constitute direct or indirect aid to

nonpublic schools; rather, aid is directed solely to students, and MCL 388.1752b, in contravention of Proposal C, provides for direct aid to nonpublic schools. Assuming this is an accurate characterization, despite the fact that nonpublic school students certainly benefit from full and financially assisted compliance with health, safety, and welfare laws, the distinction does not warrant the conclusion that MCL 388.1752b violates Const 1963, art 8, § 2. As noted in *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48 n 2, Proposal C permits aid to nonpublic schools, so long as it is merely incidental to the school's support and maintenance. In *Advisory Opinion re Constitutionality of 1974 PA 242*, *id*. at 49, the Supreme Court did not rule that a constitutional violation occurred because supplying textbooks and school supplies constituted direct aid to nonpublic schools; instead, it found the statute unconstitutional because the nature or character of the aid reflected a " 'primary' feature of the educational process and a 'primary' element required for any school to exist." Indeed, the Court expressly noted that Proposal C "permits aid" to nonpublic schools when the aid is merely incidental to a school's operation. *Id*. at 48 n 2.

The partial dissent takes us to task for supposedly ignoring the plain language of Const 1963, art 8, § 2. Were we restricted to solely examining and contemplating the language of Const 1963, art 8, § 2, *absent any other considerations and on a clean slate*, we might very well agree with our colleague's position. But *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242* were issued and cannot be ignored. And while we appreciate that the partial dissent disagrees with our interpretation of those two opinions, we respectfully disagree with her construction. In our view, *Traverse City Sch Dist* and *Advisory*

Opinion re Constitutionality of 1974 PA 242, 394 Mich 41, compel us, for purposes of assessing the constitutionality of MCL 388.1752b, to distinguish between educational services and noninstructional services that are merely incidental to educating students and operating a nonpublic school, such as those involving compliance with health, safety, and welfare mandates. Contrary to the suggestion by the partial dissent that we created the three-part test out of whole cloth, we believe that the test accurately reflects the principles and framework established by our Supreme Court in the two opinions. Therefore, any subversion of the people's will, as the partial dissent accuses us of participating in, can only be undone by the Michigan Supreme Court.[14]

In sum, with respect to the challenge under Const 1963, art 8, § 2, we reverse the ruling of the Court of

[14] With respect to note 3 in the partial dissent, the distinction between educational services and noninstructional services is not a distinction that we created, but one that emanates, in our view, from Supreme Court precedent. The argument in note 3 would equally undermine allowing aid to support the shared-time and auxiliary services addressed in *Traverse City Sch Dist*, yet our Supreme Court found no constitutional infringement in regard to those services. The crux of our disagreement with the partial dissent is not first-instance construction of Const 1963, art 8, § 2, but interpretation of binding Supreme Court opinions that have already construed the constitutional provision. Additionally, the partial dissent is ultimately speculating in regard to the intent of the ratifiers relative to why the transportation language was included in Const 1963, art 8, § 2. We note that bus transportation for all students had a long statutory history before Proposal C. See *Traverse City Sch Dist*, 384 Mich at 407 n 2. Perhaps the intent of the transportation language was simply not to disrupt the ongoing applicability of the statute and to avoid any possible confusion on the matter of transportation by providing unmistakable clarity. As a final note, comparable to supplying school books to nonpublic schools as addressed in *Advisory Opinion re Constitutionality of 1974 PA 242*, we are not even convinced that transporting children to school is merely incidental to teaching and providing educational services, which is a necessary component of the constructional theory set forth in note 3 of the partial dissent.

Claims and remand for an examination, under the proper criteria outlined in this opinion, of each of the "actual costs" for which a nonpublic school may be reimbursed under the challenged legislation. We note that, should the Court of Claims conclude that a specific cost or action to comply with a mandate violates Const 1963, art 8, § 2, it may only strike or preclude reimbursement for that cost or action, without invalidating the entire statute. See MCL 8.5.[15] Furthermore, the Court of Claims must also examine plaintiffs' contention that MCL 388.1752b violates Const 1963, art 4, § 30.[16]

Affirmed in part, reversed in part, and remanded to the Court of Claims for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

LETICA, J., concurred with MURPHY, P.J.

GLEICHER, J. (*concurring in part and dissenting in part*). Constitutional interpretation begins with the text: the words approved by the ratifiers. The words at

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[15] MCL 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

[16] Although the parties wish us to resolve the challenge under Const 1963, art 4, § 30, the Court of Claims never reached the issue, and the Court of Claims is the proper judicial body to resolve the question in the first instance.

the heart of this case are clear, cogent, and commanding. No public money may be appropriated by the Legislature "directly or indirectly to aid or maintain" a nonpublic school. Const 1963, art 8, § 2. No public money may be provided "directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . ." *Id*. The natural and ordinary meaning of those words—today and in 1970—forbids publicly funded financial aid payments to nonpublic schools.

MCL 388.1752b(1) allocates up to $2,500,000 from Michigan's general fund to "reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." By passing this statute, the Legislature opened the door to direct payments to nonpublic schools intended to help those schools do business as private institutions.

The majority carves out an exception to the resoundingly clear constitutional language forbidding direct aid. Applying a three-part test of its own making, the majority declares that payments earmarked as reimbursement for certain costs of doing business circumvent the Constitution's plain words. This holding ignores the constitutional text and imposes a judicial gloss that contradicts the people's will and the well-understood words they approved. And even if the majority's test were consistent with the Constitution, MCL 388.1752b flunks it. I respectfully dissent.

I

Soon after the people amended Article 8, § 2 of the 1963 Constitution through a voter initiative called Proposal C, the Supreme Court agreed to answer seven certified questions concerning the amendment's appli-

cation. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 403-404; 185 NW2d 9 (1971). The Supreme Court's analysis began with the words the people approved:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school. [*Id*. at 404, quoting Const 1963, art 8, § 2.]

To ascertain the meaning of these words, the Court applied "the rule of 'common understanding' " described by Justice COOLEY. *Id*. at 405. The words the voters selected and approved, Justice COOLEY instructed, point the truest course to constitutional meaning. *Id*. The people "ratified the instrument in the belief" that their understanding of the words they endorsed would be enforced. *Id*., quoting Cooley, Constitutional Limitations, p 81 (emphasis omitted). And in its most recent case of constitutional import, the Supreme Court highlighted that " 'there is no more constitutionally significant event than when the wielders of all political power' " under the 1963 Michigan Constitution "choose to exercise their extraordinary authority to directly approve or disapprove of an amendment thereto." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42, 59; 921 NW2d 247 (2018) (quotation marks omitted), quoting

Blank v Dep't of Corrections, 462 Mich 103, 150; 611 NW2d 530 (2000) (MARKMAN, J., concurring).

The words added by amendment to Article 8, § 2 are easily parsed. No public money may be appropriated by the Legislature to directly or indirectly aid or maintain nonpublic schools. The amendment brooks no exceptions or tests. The "common understanding" of those words is that the public funds may not be used to help nonpublic schools stay in business.

The Supreme Court reached the same conclusion in *Traverse City Sch Dist*, 384 Mich at 410 n 2, stating that the voters understood and intended Proposal C as a constitutional prohibition of any allocation of public money "to run parochial schools." Those who voted on the proposal, both pro and con, "agreed [that] the proposed amendment was designed to halt parochiaid and would have that effect if adopted."[1] *Id*. at 409 n 2. More than two decades later, the Supreme Court reiterated that "the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school." *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 583; 566 NW2d 208 (1997).

The circumstances surrounding the amendment's adoption buttress the unambiguous constitutional text. See *Traverse City Sch Dist*, 384 Mich at 405 ("A second rule is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered."). Those circumstances merit careful consideration, as they spotlight the fundamental flaws in the majority's reasoning. Although the major-

[1] "Parochiaid" is shorthand for "direct financial aid to nonpublic schools . . . ." *Snyder v Charlotte Pub Sch Dist*, 421 Mich 517, 524; 365 NW2d 151 (1984).

ity largely rests its decision on *Traverse City Sch Dist*, it sidesteps the facts of that case and the Court's central holdings.

Before Proposal C passed, the Legislature had appropriated funds to nonpublic schools to pay lay teachers to teach secular subjects in nonpublic schools. *Traverse City Sch Dist*, 384 Mich at 406 n 1. The purpose of these appropriations was "clearly, plainly and unambiguously" to aid nonpublic schools in meeting the increasing costs of education. *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82, 91-92; 180 NW2d 265 (1970). The appropriation of public funds to aid nonpublic schools did not sit well with the people, and Proposal C ended it. After it passed, the Supreme Court struck down as unconstitutional the appropriation statute that it had approved just a year earlier. *Traverse City Sch Dist*, 384 Mich at 408.

Not only did passage of the amendment end direct payment of nonpublic school-employee salaries; the Court also specifically identified four other fundamental tenets encapsulated within Proposal C, listing all five as follows:

> 1. No public money "to aid or maintain" a nonpublic school;
>
> 2. No public money "to support the attendance of any student" at a nonpublic school;
>
> 3. No public money to employ any one at a nonpublic school;
>
> 4. No public money to support the attendance of any student at any location where instruction is offered to a nonpublic school student[;]
>
> 5. No public money to support the employment of any person at any location where instruction is offered to a nonpublic school student. [*Id*. at 411.]

The Court evaluated various services historically provided to nonpublic school students in the light of these five prohibitions, identifying several services that could continue despite the funding ban. In stark contrast with the statute now at issue, none of the surviving services involved the direct payment of public funds to nonpublic schools.

The details of these services delimit the reach of Proposal C and offer a window into the Supreme Court's reasoning. But rather than using the Court's analysis of those services as a guide, the majority hangs its hat on two phrases loosely derived from *Traverse City Sch Dist*: "incidental aid" and "primary function." According to the majority, direct aid payments to nonpublic schools do not offend the Constitution if they are designated as reimbursements for state health, safety, and welfare mandates, and are "(1) . . . at most, merely *incidental* to teaching and providing educational services to nonpublic school students (noninstructional in nature), (2) do[] not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive, and (3) do[] not involve or result in excessive religious entanglement." The majority's novel test, however, is divorced from the text of Article 8, § 2 and from the contexts in which the Supreme Court actually deployed the italicized words.

Before Proposal C passed, public schools offered various services to nonpublic school students that potentially conflicted with the amendment. The Supreme Court dubbed those services "shared time" and "auxiliary" instruction. Under certain highly specific circumstances, the Court held, the provision of shared-time and auxiliary services did not contravene Proposal C. In so concluding, the Court introduced the concept of an "incidental" benefit. But the shared time

and auxiliary services approved in *Traverse City Sch Dist* differ profoundly from the direct allocation of funds called for by MCL 388.1752b. Lifting a phrase or two from the Court's analysis cannot change the critical differences between the services approved in 1971 and the payments now at issue.

Unlike here, "shared time" did not encompass the appropriation of public money to "aid or maintain" a nonpublic school. See Const 1963, art 8, § 2. Unlike here, auxiliary services did not involve an allocation of public money "to support the attendance of any student or the employment of any person" at a nonpublic school. See *id*. In *Traverse City Sch Dist*, 384 Mich at 413, the Supreme Court took great pains to draw a constitutional line between services provided to nonpublic schools funded by public dollars—forbidden under Proposal C—and those offered to nonpublic school students but funded entirely through payments to *public* schools; the latter could continue because the money stayed in the public fisc and was not "paid to a private agency." A closer look at the services approved in *Traverse City Sch Dist* demonstrates their dissimilarity to the direct funding approach now ratified by the majority.

Shared time, *Traverse City Sch Dist* explained, is "an arrangement for pupils enrolled in nonpublic . . . schools to attend public schools for instruction in certain subjects . . . ." *Id*. at 411 n 3 (quotation marks and citation omitted). More concretely, shared time occurs when a "public school district makes available courses in its general curriculum to both public and nonpublic school students normally on the premises of the public school." *Id*. The Court found no constitutional fault with shared-time services if public money was used to pay public school districts to hire public

school teachers to teach public school courses in public schools. The Court's rationale rested largely on "control." *Id*. at 414. Shared time conducted on public school premises "is under the complete control of the public school district," the Court observed, and any aid to nonpublic schools is "only incidental" at best. *Id*. Nor does shared time at the public school "support the attendance" of students at nonpublic schools other than in a "remotely incidental" way. *Id*. (quotation marks omitted).

Shared-time classes conducted on leased premises "under the authority, control and operation of the public school system," the Court opined, create no conflict with Article 8, § 2. *Traverse City Sch Dist*, 384 Mich at 415. This is so because "[p]remises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public schools." *Id*. Accordingly, shared time offered on nonpublic school premises is acceptable only if the public school maintains "the ultimate and immediate control of the subject matter, the personnel and the premises . . . ." *Id*. Further, the Court instructed, the courses must be "open to all eligible to attend a public school." *Id*. Article 8, § 2 is not offended under such circumstances, the Court explained, because the public schools wield all the control over the courses, the teachers, and the instructional locations, and any aid to the nonpublic school is "only incidental." *Id*. at 416.

What did the Court mean by "incidental" in the shared-time context? Shared time within carefully circumscribed limits did not "aid or maintain" nonpublic schools. Shared time sponsored and implemented entirely by public schools benefited *students*, not in-

stitutions. No funds for shared time were allocated as aid to nonpublic schools, and no public money "support[ed] . . . the employment" of nonpublic school personnel. By limiting shared time to circumstances in which absolute control over every dollar was retained by public schools, the Court respected Article 8, § 2's command that no public aid enrich nonpublic school coffers, even indirectly.

The shared-time services that passed constitutional muster in *Traverse City Sch Dist* are a far cry from the direct payment of public funds to nonpublic schools approved by the majority. The Supreme Court highlighted that permissible shared-time services afford nonpublic schools only "incidental aid, if any," because nonpublic schools were not monetarily enriched. *Id*. at 414. The majority hijacks the concept of "incidental" aid or benefit and transforms it into a new exception to the Constitution's plain language. Under the majority's test, the first question is whether money given to nonpublic schools is "merely *incidental* to teaching and providing educational services to nonpublic school students." But the "incidental" benefit idea advanced in *Traverse City Sch Dist* had nothing to do with teaching and everything to do with following the money. *Traverse City Sch Dist* could not be any more direct than the first "prohibition" it listed: "No public money to 'aid or maintain a nonpublic school[.]' " *Id*. at 411. The Court has underscored that concept repeatedly: "Proposal C was an anti-parochiaid amendment—no public monies to run parochial schools . . . ." *Id*. at 410 n 2. "[T]he common understanding of the voters in 1970 was that no monies would be spent to run a parochial school." *Council of Organizations & Others for Ed About Parochiaid, Inc*, 455 Mich at 583. The " 'anti-parochiaid' amendment prohibited the direct or indi-

rect use of public funds to aid or maintain a nonpublic school[.]" *Snyder*, 421 Mich at 531.

The majority's test does not engage the constitutional text or address these pronouncements. The voters understood that providing money for a private school's overhead is exactly the same thing as directly allocating aid and maintenance payments. It does not matter whether the overhead payments are intended to cover "education" or any of the myriad costs that a business must bear. Public money may not aid or maintain a nonpublic school even if the aid is 100% "incidental" to teaching, because in passing Proposal C the people meant to entirely curtail public financial support for nonpublic school operations.

The Supreme Court's discussion of "auxiliary services" doesn't aid the majority, either. As they existed in 1971, "auxiliary services" were statutorily defined as follows:

> "Whenever *the board of education of a school district* provides any of the auxiliary services specified in this section to any of its resident children in attendance in the elementary and high school grades, *it shall provide* the same auxiliary services on an equal basis to school children in attendance in the elementary and high school grades at non-public schools. The board of education may use state school aid funds of the district to pay for such auxiliary services. Such auxiliary services shall include health and nursing services and examinations ; street crossing guards services ; national defense education act testing services ; speech correction services ; visiting teacher services for delinquent and disturbed children ; school diagnostician services for all mentally handicapped children ; teacher counsellor services for physically handicapped children ; teacher consultant services for mentally handicapped or emotionally disturbed children ; remedial reading ; and such other services as may be determined by the legislature. Such auxiliary services shall be provided

> in accordance with rules and regulations promulgated by the state board of education * * *." [*Traverse City Sch Dist*, 384 Mich at 417-418, quoting MCL 340.622, as enacted by 1955 PA 269, repealed by 1976 PA 451 (emphasis added).]

According to this statute, "auxiliary services" were provided by the board of education of a school district to public school students. If a board offered the services to public school pupils, the *board* ("it") had to allow nonpublic school students to partake in those services. The Supreme Court described the auxiliary services called for in MCL 340.622 as "special educational services designed to remedy physical and mental deficiencies of school children and provide for their physical health and safety. Functionally, they are general health and safety measures." *Traverse City Sch Dist*, 384 Mich at 418-419.

Proposal C had "no impact" on auxiliary services, the Court held, as they were only "incidental" to the instruction of private school children. *Id*. at 419. "Consequently," the Court highlighted, "the prohibitions of Proposal C *which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation* are not applicable to auxiliary services which only incidentally involve the operation of educating private school children." *Id*. at 419-420 (emphasis added). The Court buttressed its analysis by returning to the question of control, likening auxiliary services to shared-time instruction "in that private schools exercise no control over them. They are performed by public employees under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school." *Id*. at 420. The "auxiliary services" approved by the Supreme Court in *Traverse City Sch Dist* did not violate the Constitution because no public money

flowed "into private school hands for the purposes of running the private school operation" and the "aid" at the center of the Supreme Court's analysis benefited students with special needs rather than the schools they otherwise attended.

The Supreme Court concluded its analysis of auxiliary services with a prescient circumscription of its meaning. "[A]uxiliary services," it declared, are "limited to those . . . enumerated in the auxiliary services act." *Id*. Although the act allowed the Legislature to add services to those listed in the statute, the Court warned that this clause "does not give the legislature a blank check to make any service a health and safety measure outside the reach of Proposal C simply by calling it an auxiliary service." *Id*.

II

The "primary function" aspect of the majority's new test also lacks precedential support. This phrase purportedly derives from the Supreme Court's 1975 analysis of the constitutionality of a statute requiring public school districts to purchase and loan textbooks and purchase supplies for all children of school age, including those enrolled in nonpublic schools. *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 51; 228 NW2d 772 (1975). The Court looked to *Traverse City Sch Dist* for guidance, distilling a distinction between services "properly classified as 'incidental' to a private school's establishment and existence" and programs forming " 'primary' elements necessary for the school's survival as an educational institution." *Id*. at 48-49. The Court explained that the services permitted in *Traverse City Sch Dist* were "useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed

through Proposal C." *Id*. at 49. Funding the costs of textbooks and supplies essentially subsidized private school operations, the Court held, as they "are essential aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist." *Id*.

According to the majority, allocating public funds to nonpublic schools to cover the costs of criminal background checks, maintaining epinephrine injectors, and disposing of instruments containing mercury, all mandated by state law, is permissible because these tasks "do[] not constitute a primary function or element necessary for a nonpublic school's existence, operation, and survival . . . ." The majority's strained reasoning illustrates the infirmities of its test. Criminal background checks of school personnel (public and private) are a safety measure mandated by state law. Because they are a mandate, they are, by definition, a primary element necessary for a school's operation. Nor can I agree that criminal background checks are merely "incidental" to providing educational services. A school may not employ a teacher who has been convicted of a listed sex offense, as a teacher convicted of a listed sexual crime is not legally qualified to teach Michigan children. See MCL 380.1230(9). Employing legally qualified teachers is a primary function of a school. I cannot agree that criminal-background-check costs are either "incidental" to a school's existence or fall outside a school's primary function.[2]

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[2] Nor are the other mandates accurately characterized as "incidental" as that term was used in *Traverse City Sch Dist*. Shared-time and auxiliary services were approved because providing those services to nonpublic school students did not directly or indirectly aid or maintain nonpublic schools. The assistance provided by the services was to *students* and was at most "only incidental" to the operation of the nonpublic schools. All schools must comply with health and safety

But I see no reason for the majority's test, or any test. We are not free to engraft special language on constitutional text that needs no such clarification. The Supreme Court has repeatedly reinforced that the pertinent language in Article 8, § 2 means "no monies [may] be spent to run a parochial school." *Council of Organizations & Others for Ed About Parochiaid*, 455 Mich at 583. The ratifiers intended that the amendment would "halt parochiaid." *Traverse City Sch Dist*, 384 Mich at 409 n 2. The words themselves ban direct aid to nonpublic schools regardless of the beneficence of its intentions, and the majority has not explained how its textual dodging and weaving is nevertheless consistent with the amendment's words.

The threshold inquiries in this case *should* be: does the reimbursement of state mandates constitute direct or indirect aid to a nonpublic school? Is the reimbursement of state mandates with public funds a "payment," "subsidy," or "grant" of public money "to support the attendance" of a student or "the employment of any person" at a nonpublic school? The answer to each of these questions is yes. A direct payment to a nonpublic school intended to offset the costs of doing business is aid, a payment, a subsidy, and a grant. The public money directly and indirectly assists nonpublic schools in keeping their doors open and meeting their payroll. It is unconstitutional for that simple reason.

III

Measured against the Constitution's plain language and the caselaw backdrop, MCL 388.1752b cannot be sustained. The public funds appropriated by the stat-

mandates, and all must spend money to do so. The point of Proposal C is that the ratifiers did not want to subsidize private schools for the costs that the people were already paying to keep public schools open.

ute are paid directly to nonpublic schools. Garbing the appropriation in "health, safety and welfare" dress does not change its fundamental character. The money is intended to help nonpublic schools cover the overhead costs that result from adherence to governmental mandates. Assisting nonpublic schools in this fashion is precisely what the voters sought to outlaw by passing Proposal C.

Nor can I accept the majority's premise that *Traverse City Sch Dist* and its progeny interpreted Article 8, § 2 to prohibit only expenditures that directly aid a nonpublic school's "educational programs." The majority ignores the statute's pronouncement that the "funds appropriated under this section are for purposes related to education . . . ." MCL 388.1752b(7). Putting that aside, whether a cost borne by a nonpublic school is "educational" or in the nature of overhead, the underlying principle remains the same: the Legislature may not appropriate funds to offset costs if doing so directly or indirectly "aids or maintains" the nonpublic school.[3]

In addition to violating Article 8, § 2's direct/indirect aid clause, MCL 388.1752b fatally collides with the clause prohibiting the Legislature from providing any "payment" or "subsidy" that directly or indirectly "sup-

[3] The amendment's text supplies another basis for rejecting the majority's distinction between "education"-related costs and other expenses involved in operating a school. The last sentence of Article 8, § 2 states: "The legislature may provide for the transportation of students to and from any school." Transportation is not an educational function. If the ratifiers intended that the amendment's aid prohibitions encompassed only purely "educational" expenses, why was the transportation sentence included? If, as the majority contends, the balance of the text covered only "educational" costs, the transportation sentence would have been unnecessary. I submit that the best answer to my question is that the ratifiers sought to forbid *all* aid, direct or indirect, "educational" or otherwise, and carved out a single exception: transportation.

port[s] . . . the employment of any person" at a nonpublic school. The majority holds that reimbursing the "actual wages" of those nonpublic school employees for work in satisfying governmental mandates does not run afoul of the Constitution because "the tasks being performed are for the health, safety, or welfare of schoolchildren and are merely incidental to providing educational services to the students; the tasks are noninstructional in nature." I am unpersuaded.

Any way I look at the statute's definition of "actual costs," it is impossible to avoid concluding that in enacting MCL 388.1752b, the Legislature created a mechanism for direct wage reimbursement. That the reimbursement is well-intentioned does not transfigure a transfer of funds intended to reimburse wages into something other than a transfer of funds intended to reimburse wages. It is equally impossible to ignore that this mechanism conflicts with the clause in Article 8, § 2 forbidding any subsidies that support employment at a nonpublic school. The electors who ratified Article 8, § 2 apparently anticipated efforts to support the employment of nonpublic school workers and approved language plainly prohibiting it. Here, the financial support appropriated for nonpublic schools is direct; reimbursing wages is the same thing as paying money to support employment, and it is constitutionally prohibited.

MCL 388.1752b is irreconcilably inconsistent with Const 1963, art 8, § 2, and I would affirm the Court of Claims.[4]

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[4] I am in full agreement with the majority's analysis of the standing issue, as MCL 600.2041(3) indisputably affords plaintiffs with standing in this case.

LUNA v REGNIER

Docket No. 343382. Submitted October 9, 2018, at Detroit. Decided October 18, 2018, at 9:00 a.m.

Carrie M. Regnier (defendant) appealed an order of the Tuscola Circuit Court, Family Division, Nancy L. Thane, J., that had suspended her parenting time with her children, ZR and DR. Another child, CR, had turned 18 in December 2017 and was no longer subject to the court's jurisdiction. Defendant and the children's father, William L. Luna (plaintiff), never married but had lived together with CR, ZR, and DR as a family unit until January 2010. Plaintiff initiated the custody proceeding after the parties' separation. A separate Children's Protective Services (CPS) proceeding was subsequently initiated against plaintiff, and defendant came under the court's jurisdiction pursuant to the "one-parent doctrine." Although the CPS proceeding initially concerned plaintiff's supervision of the children, the children were ultimately returned to his care, and the court terminated defendant's parental rights. The Court of Appeals, BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ., affirmed the termination in an unpublished opinion issued July 23, 2013 (Docket No. 313657). Defendant sought leave to appeal, and the Supreme Court remanded the case to the trial court for reconsideration in light of the abolition of the one-parent doctrine. 497 Mich 975 (2015). The termination petition was then withdrawn. In the custody proceeding, plaintiff had been granted sole legal and physical custody. After defendant's parental rights were reinstated, plaintiff—and later the children's guardian ad litem—sought to suspend defendant's parenting time because of the children's negative feelings toward their mother. The court entered the requested order. Defendant requested that the order be rescinded, but the court denied the request and instead entered an order suspending parenting time until the children requested contact with defendant. Defendant appealed.

The Court of Appeals *held*:

1. A child's best interests govern a court's decision regarding parenting time, and under MCL 722.27a(1), it is presumed that it is in a child's best interests to have a strong relationship with both of the child's parents. Therefore, MCL 722.27a(1) mandates that

parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. However, according to MCL 722.27a(3), if the record shows by clear and convincing evidence that parenting time would endanger the child's physical, mental, or emotional health, the trial court is not required to order parenting time. In this case, the trial court conducted a lengthy review of the best-interest factors to reach its decision suspending defendant's parenting time, and the facts do not clearly preponderate in the opposite direction. Forced parenting time in ZR's case was likely to cause him emotional trauma and to further drive a wedge between ZR and defendant, especially when ZR strongly expressed his preference that he be allowed to consider a relationship with defendant in the future at his own discretion. Defendant contended that ZR's negative feelings could not be attributed to her because she had had limited contact with him during the previous six years. Defendant also argued that the trauma assessor and ZR's counselor did not actually conclude that parenting time would damage ZR's mental or emotional health. Notwithstanding the absence of such a direct statement of harm, it was not against the great weight of the evidence for the trial court to extrapolate that finding from the opinions and conclusions the assessor and counselor submitted. Likewise, the trial court's finding that DR's mental or emotional health would be damaged by parenting time with defendant was not against the great weight of the evidence. Even though the trial court noted that the children's anxiety and stress might be unfounded, it gave the children's perceptions credence, and the children's perceptions were supported by the trauma assessments and the counselors' letters. Defendant also asserted that plaintiff had actively estranged the children from her, that he had spoken ill of her in front of the children, and that his wife had hurled insults and obscenities at defendant in front of the children. However, there was also testimony that plaintiff encouraged the children to attend parenting time. Plaintiff testified that he did not know why the children felt negatively about defendant and that he did not speak negatively about defendant in front of them. The trial court had discretion to weigh the credibility of the witnesses' testimony, and the trial court's determinations on those matters could not be second-guessed on appeal. In short, the trial court's finding that clear and convincing evidence showed that the children's mental or emotional health would be endangered by parenting time with defendant was not against the great weight of the evidence because the facts did not clearly preponderate in the opposite direction. The trial court's finding was supported by psychological assessments,

letters from their counselors, and the children's own statements. Therefore, the trial court's order suspending defendant's parenting time was not so palpably and grossly violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or the exercise of passion or bias.

2. The trial court suspended defendant's parenting time without providing a mechanism for periodic hearings to receive information from the children's counselors or their guardian ad litem in order to determine whether parenting time would be in their best interests at some time in the future. Defendant argued that the trial court's order suspending her parenting time without ordering reunification therapy constituted a de facto termination of her parental rights. The trial court did not abuse its discretion by suspending defendant's parenting time without ordering reunification therapy, but the trial court should have ordered periodic hearings to determine whether the children wished to reinitiate contact with defendant and whether resumption of parenting time would be in their best interests. Without a mechanism for further review, defendant's parental rights were effectively nonexistent.

Affirmed in part but remanded for the trial court to conduct periodic review hearings.

Lori B. Selvidge for plaintiff.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Andrea Muroto*) for defendant.

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. Defendant appeals as of right the trial court's order suspending her parenting time. We affirm the trial court's suspension of parenting time, but we remand for the trial court to conduct periodic hearings to determine whether reinstituting parenting time would be in the children's best interests.

Defendant and plaintiff were never married, but lived together as a family unit with their children, CR,[1]

[1] CR turned 18 during the pendency of this case and is no longer subject to the court's jurisdiction.

ZR, and DR. In January 2010, defendant traveled to Florida for approximately six months to assist her two sons from a previous relationship. The children remained in plaintiff's care in Michigan. In May 2010, defendant returned to Michigan to retrieve the children and take them back to Florida with her. The children had been living with defendant in Florida for approximately six weeks when plaintiff initiated this custody action, procured an ex parte custody order, and retrieved the children from Florida. Defendant returned to Michigan in September 2010 to find the children living in "deplorable and unsanitary conditions" with plaintiff, and defendant reported this to Children's Protective Services (CPS). A child protective proceeding was initiated against plaintiff, and the children were placed in foster care. Plaintiff entered a plea with respect to the allegations in the petition. A dispositional order indicates that defendant was granted supervised parenting time[2] and was ordered to cooperate with the Department of Health and Human Services (DHHS), which imposed a treatment plan that included counseling, a psychological evaluation, and services for parenting skills. A supplemental petition was filed on March 16, 2011, that included defendant as a respondent based on concerns regarding her emotional stability and parental visitations, and explained that defendant was not compliant with services.

The children were returned to plaintiff's custody in September 2011, and he filed for temporary custody. Defendant objected and a hearing was held in Novem-

[2] Although defendant was not a respondent in the child protective proceedings, she came under the family court's jurisdiction because of the now-defunct "one-parent doctrine." See *In re Sanders*, 495 Mich 394, 421-423; 852 NW2d 524 (2014).

ber 2011; defendant was not present. At the hearing, the foster-care worker testified that she believed that it was in the children's best interests to remain in plaintiff's custody. At the conclusion of the hearing, plaintiff was awarded sole legal and physical custody of the children and defendant was granted two hours of supervised parenting time per week, which was consistent with the parenting time that she had been granted in the child protective proceeding. In March 2012, the DHHS successfully moved to suspend defendant's visitation, alleging that she had missed visits and that her "inconsistency and unpredictability" was damaging to the children. On November 13, 2012, the trial court terminated defendant's parental rights, largely on the basis of her noncompliance with services. This Court affirmed,[3] but our Supreme Court remanded the case to the trial court on the basis of the Supreme Court's abolition of the "one-parent doctrine" in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014).[4] The DHHS subsequently withdrew its petition, and defendant's parental rights were reinstated in June 2015.

Plaintiff filed a petition to suspend parenting time, explaining that the children had not seen defendant in three years, did not want to see her, and would "act out in frustration" at the mention of their mother. The trial court spoke to the children in chambers, and they "adamantly" expressed that they did not wish to spend any time with defendant. The trial court entered a temporary parenting-time order granting defendant two hours of parenting time per week for two weeks and then four hours per week after that.

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[3] *In re Regnier*, unpublished per curiam opinion of the Court of Appeals, issued July 23, 2013 (Docket No. 313657).

[4] *In re Reginier* [sic], 497 Mich 975 (2015).

The evidentiary hearing continued in November 2015. The children's guardian ad litem (GAL) testified that the children expressed to her that they did not want to see defendant and were "struggling" with parenting time. She reported that the children had been "bolting" into the woods in order to avoid spending time with defendant. She was unsure why the children felt so negatively about their mother, and she recommended that the children remain in therapy and that defendant eventually be integrated into that therapy. Plaintiff's neighbors testified that in their opinion, the children lived in a bad environment full of questionable people and that the children suffered from a lack of discipline and supervision.

In December 2015, the GAL moved to suspend defendant's parenting time because the children's negative behaviors were increasing and intensifying as visitation continued. According to the GAL, the children's counselors also believed that it would be beneficial to suspend parenting time because the stress and anxiety it caused the children negatively affected their progress on other mental, social, and educational issues. The trial court granted the GAL's motion, and defendant has not been allowed any parenting time since.

Defendant subsequently requested that the trial court rescind the order suspending her parenting time. At a hearing in May 2016, a therapist, who was referred to the family by CPS, testified that she worked with plaintiff and the children from October 2015 until February 2016 to assist with parenting, family building, and therapy. She said that when her involvement began there were problems in the home with positive parenting skills, budgeting, and hygiene, and concerns regarding visitation with defendant. The children "ex-

pressed dislike for the biological mother" and informed her that they were running away from parenting visits. The hearing was adjourned because defendant wanted to have psychological evaluations performed on the children. In the fall of 2017, after several delays arising from disagreements between the parties concerning the evaluations, DR and ZR underwent neurodevelopmental trauma assessments, which were submitted to the court. Their respective counselors also reviewed the assessments and rendered opinion letters to the court.

The trial court found that the children had an established custodial environment with plaintiff. After considering the best-interest factors in MCL 722.23, the trial court concluded that it was "convinced by clear and convincing evidence that parenting time should be completely suspended" because "contact with mother may be harmful to the children's mental and emotional health at the present time." The trial court entered an order indicating that parenting time was suspended until the minor children requested contact with defendant. Defendant now appeals as of right.

Defendant first argues that there was insufficient evidence for the trial court to determine by clear and convincing evidence that parenting time with defendant would endanger the children's mental or emotional health. We disagree.

"Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010) (quotation marks and citation omitted). "The child's best interests govern a court's decision regarding parenting time." *Id*. at

31. "It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1). Therefore, "parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." *Id*. However, if "it is shown on the record by clear and convincing evidence that [parenting time] would endanger the child's physical, mental, or emotional health" the court need not order parenting time. MCL 722.27a(3).[5]

In rendering its decision, the trial court conducted a lengthy analysis of the best-interest factors from MCL 722.23; the trial court also considered the children's trauma assessments and their counselors' opinion letters. After review of these confidential records, this Court concludes that the trial court's finding was not against the great weight of the evidence because the facts do not "clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21.

In regard to ZR, our review indicates that forced parenting time, especially in light of ZR's strongly expressed preference that he be allowed to consider a relationship with defendant in the future at his own

[5] A parent seeking to modify a parenting-time order must first establish that there is proper cause or a change in circumstances warranting the modification. *Lieberman v Orr*, 319 Mich App 68, 81; 900 NW2d 130 (2017). The trial court found that throughout the past three years there had been an "ongoing change of circumstances warranting the Court to proceed with a determination . . . ." The parties do not dispute this finding. Further, "[i]n a parenting-time matter, when the proposed change would not affect the established custodial environment, the movant must prove by a preponderance of the evidence that the change is in the best interests of the child." *Id*. at 84. The trial court found that the suspension of parenting time would not affect the established custodial environment. The parties also do not dispute this finding on appeal.

discretion, was likely to cause emotional trauma and to drive a wedge further between mother and child, not foster a strong relationship. See MCL 722.27a(1). Defendant contends that ZR's negative feelings cannot be attributed to her because she has had limited contact with the child in the previous six years. However, the trial court considered this fact when it recognized that defendant "[had] been restricted on the ability to give her children love, affection and guidance" and that the children's emotions and perceptions may be "unfounded." Defendant also argues that the trauma assessor and ZR's counselor did not "actually conclude[]" that his mental or emotional health would be damaged by parenting time. Although the trauma assessor and counselor did not directly state that "parenting time would emotionally or mentally harm" the child, it was not against the great weight of the evidence for the trial court to extrapolate that finding from the opinions and conclusions they submitted. See *Shade*, 291 Mich App at 21.

Next, defendant argues that DR's assessment does not support the trial court's finding by clear and convincing evidence that parenting time with defendant would damage DR's mental or emotional health. While defendant may disagree with the assessment's conclusions, the assessment supports the trial court's finding that parenting time could be emotionally or mentally damaging to DR. See MCL 722.27a(3). We note that plaintiff and his wife discouraged DR from talking about defendant at the assessment; however, this brief example does not overshadow the assessor's conclusion. Furthermore, there was no finding by either the assessor or DR's counselor of the existence of any parental alienation. Both the assessor and the counselor opined that DR needed stability, and they did not opine that defendant could be a part of that

stable environment. Overall, we cannot conclude that the trial court's finding that parenting time with defendant would harm DR mentally or emotionally was against the great weight of evidence. See *Shade*, 291 Mich App at 21.

Defendant argues that the trial court ignored substantial evidence of positive parenting and her great concern for her children; she also notes that ZR and DR may have been negatively influenced by CR, who is no longer subject to the court's jurisdiction. However, whether parenting time went well from September 2015 until December 2015 and whether CR instigated problems is not of consequence to whether parenting time would be harmful for the children *now*. We note that the trial court did not find any evidence that defendant acted inappropriately with her children or did anything to purposely damage their mental or emotional health. As the trial court noted, the children's anxiety and stress may very well be "unfounded." However, the trial court found it important to give their perceptions credence. This was supported by the assessments and the counselors' letters and was not against the great weight of the evidence. See *id*.

Defendant also argues that plaintiff has actively estranged the children from her and spoken ill of her in front of them, and that plaintiff's wife has hurled insults and obscenities at defendant in front of the children. However, there was also testimony that plaintiff encouraged the children to attend parenting time. Plaintiff testified that he did not know why the children felt negatively toward defendant and that he did not speak negatively about her in front of them. The trial court had the discretion to weigh the credibility of the evidence and the witness testimony. We do not second-

guess its determination. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 459; 705 NW2d 144 (2005).

In sum, the trial court's finding that there was clear and convincing evidence that the children's mental and emotional health would be endangered by parenting time was not against the great weight of the evidence, because the facts do not "clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21. This finding was supported by psychological assessments of both children, letters from their counselors, and the children's own expressions. Therefore, the trial court's order suspending parenting time is not "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*.

Finally, defendant argues that the trial court's order suspending her parenting time without ordering reunification therapy constituted a de facto termination of her parental rights. While we do not believe that the trial court abused its discretion by suspending defendant's parenting time and declining to order reunification therapy, we do believe that it is necessary to remand this case and direct the trial court to conduct periodic hearings to determine whether the children wish to reinitiate contact with defendant and whether resumption of parenting time would be in their best interests.

Defendant's parenting time has been suspended since December 2015, and the trial court's order provides no mechanism for it to review whether the children may, in the future, wish to reinitiate contact with defendant unless the children or plaintiff proactively relay this information to the trial court, which appears unlikely in light of the history of this case. The trial court should have ordered periodic hearings to

receive information from the children's counselors or their GAL in order to determine whether parenting time would be in their best interests at some time in the future. Without a mechanism for further review, defendant's parental rights are effectively nonexistent.

Affirmed in part, as detailed above, but remanded for the trial court to conduct periodic review hearings. We do not retain jurisdiction.

O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

PEOPLE v BROWN

Docket No. 339318. Submitted October 2, 2018, at Detroit. Opinion released October 23, 2018, at 9:00 a.m. Date of issuance amended by order to June 18, 2019. 328 Mich App 801 (2019).

Eddie Brown was convicted following a jury trial in the Oakland Circuit Court of three counts of first-degree criminal sexual conduct (CSC-I)—one under MCL 750b(1)(a) (sexual penetration with a victim less than 13 years of age) and two under MCL 750b(1)(b)(*i*) (sexual penetration with a victim at least 13 but less than 16 years of age and a member of the same household)—and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*i*) (sexual contact with a victim at least 13 but less than 16 years of age and a member of the same household). Defendant lived in the same house with the victim and her mother, who was defendant's girlfriend. Defendant had sexual contact with and orally penetrated the victim when she was 12 years old and anally and orally penetrated the child when she was 13 years old; defendant also took sexually explicit photographs of the victim on his cell phone during that time frame. Ultimately, the victim reported the abuse to friends and then to her aunt and uncle; the victim thereafter located and gave to her uncle the old cell phone on which defendant had taken the photographs of her. At trial, the prosecution sought to introduce 11 of the 45 photographs recovered from defendant's cell phone. Defendant objected to their admission, arguing that they were more prejudicial than probative because of their graphic nature and that the evidence was not necessary because the victim could testify regarding the photographs. The court, Hala Y. Jarbou, J., admitted only four of the photographs, specifically those that included an image of defendant's hands—identified as such by the victim—as well as the victim's body and vagina. The trial court also qualified Katrina Sadowski as an expert in forensic nursing over defendant's objection; Sadowski testified regarding her forensic examination of the victim. Defendant appealed.

The Court of Appeals *held*:

1. Photographic evidence is generally admissible as long as it is relevant and not unduly prejudicial. Photographs may be used

to corroborate a witness's testimony, and photographs must be excluded under MRE 403 only when the danger of unfair prejudice substantially outweighs the probative value of the evidence. Photographs that are merely calculated to arouse the sympathies or prejudices of the jury should not be admitted. However, if a photograph is otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. In that regard, sexually explicit photographs used as evidence of a sexual assault of a minor are not unfairly prejudicial per se; rather, a trial court must weigh under MRE 403 the probative value of such evidence against any potential prejudice. In this case, the photographs were not introduced merely to inflame the jurors but, rather, illustrated defendant's propensities, illustrated the depicted acts, and corroborated the victim's testimony that defendant took the photographs and had a sexual interest in her. Accordingly, any prejudice was outweighed by the probative value of the photographs, and the trial court did not abuse its discretion by admitting them.

2. MRE 702 provides that if a court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise if (1) the testimony is based on sufficient fact or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. MRE 702 does not require that an expert be certified by the state in the particular area in which the expert is qualified, only that an expert may be qualified on the basis of knowledge, skill, experience, training, or education. In this case, the trial court did not abuse its discretion by qualifying Sadowski as an expert witness in forensic nursing. Although she was not yet certified by the state as a sexual-assault nurse examiner, she had an associate's degree in nursing and a nursing license, had taken online courses in sexual assault training, had worked at Haven (a nonprofit organization that helps victims of sexual assault) since 2009, and had performed 30 examinations as a sexual assault nurse examiner, which was sufficient for her to be qualified as an expert in the area of forensic nursing. Defendant's remaining unpreserved challenges to Sadowski's testimony were without merit, and the admission of the testimony did not constitute plain error affecting defendant's rights.

3. A judge is entitled to rely on the information in the presentence investigation report (PSIR), and the report is presumed to be accurate unless the defendant successfully challenges the accuracy of the factual information. In this case, defendant failed to establish plain error on the cover sheet of the PSIR because the cover sheet correctly informed the trial court that the maximum possible sentence for each of defendant's CSC-I convictions was life imprisonment.

Affirmed.

1. EVIDENCE — ADMISSION OF SEXUALLY EXPLICIT PHOTOGRAPHS — SEXUAL ASSAULT CASES INVOLVING A MINOR — BALANCING TEST UNDER MRE 403.

Sexually explicit photographs used as evidence of a sexual assault of a minor are not unfairly prejudicial per se; rather, a trial court must weigh under MRE 403 the probative value of such evidence against any potential prejudice.

2. WITNESSES — EXPERT WITNESSES — QUALIFICATION OF EXPERT WITNESSES — CERTIFICATION BY STATE NOT REQUIRED FOR QUALIFICATION AS EXPERT WITNESS.

MRE 702, which governs the admissibility of expert testimony, does not require that an expert be certified by the state in the particular area in which the expert is qualified, only that the expert be qualified on the basis of knowledge, skill, experience, training, or education.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

Wendy Barnwell for defendant.

Before: MURRAY, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals as of right his jury convictions of three counts of first-degree criminal sexual conduct (CSC-I)—one under MCL 750.520b(1)(a) (sexual penetration with a victim less than 13 years of

age) and two under MCL 750.520b(1)(b)(*i*) (sexual penetration with a victim at least 13 but less than 16 years of age and a member of the same household)—and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(b)(*i*) (sexual contact with a victim at least 13 but less than 16 years of age and a member of the same household). The trial court sentenced defendant as both a second-offense habitual offender, MCL 769.11, and as a second CSC-I offender against a minor under the age of 13 with respect to one count of CSC-I, MCL 750.520b(2)(c), and as a second CSC-I offender with respect to the other two counts of CSC-I, MCL 750.520f, imposing sentences of life in prison for the CSC-I conviction under § 520b(1)(a), 10 to 40 years in prison for each CSC-I conviction under § 520b(1)(b)(*i*), and 5 to 22½ years in prison for the CSC-II conviction, to be served concurrently. We affirm.

I. FACTS AND EVIDENCE

Defendant sexually abused the victim when she was 12 and 13 years old and lived in the same house as defendant. Defendant was the boyfriend of the victim's mother, and he began living in the victim's home while her mother was pregnant with defendant's child. The sexual abuse took place multiple times over the course of approximately five months, beginning with odd, inappropriate statements to the victim in January 2010 and culminating in a final act of sexual assault on or about May 5, 2010. Defendant initially made statements to the victim along the lines of wishing she was her mother, defendant's girlfriend, and other unsettling phrases. The first instance of physical sexual assault took place in February when the victim was still 12 years old. Defendant, under the guise of punishing her for talking to boys, forced the victim to lift

her shirt and allow him to put her breasts into his mouth. He then ordered the victim to lie down on the bathroom floor and remove her pants. Defendant then performed cunnilingus on the victim. Defendant's first charge, CSC-I (sexual penetration with a victim under the age of 13), and fourth charge, CSC-II (sexual contact with a victim at least 13 but less than 16 years of age and residing in the same household), arise from this first assault. This was defendant's second CSC-I conviction for penetration of a victim under the age of 13, mandating an automatic sentence of life.

Charges two and three, CSC-I (sexual penetration with a victim between the ages of 13 and 16 who resides within the same household), involved anal and oral penetration of the victim after her thirteenth birthday. Defendant forced the victim on at least one occasion to perform fellatio on him, again under the guise of punishment. Defendant would show up in the victim's room in the early morning hours and often hover or sit on the edge of the bed until the victim woke. Defendant, on at least one occasion, offered the victim a choice between performing oral sex on him and having him perform oral sex on her. On or about May 5, 2010, the final assault took place in the early morning hours. Defendant penetrated the victim anally, required the victim to pull down her night shirt, and ejaculated onto her breast. Later that morning at the bus stop, the victim told her best friend that she didn't feel well because defendant had kept her up all night and that defendant had assaulted her again. She then borrowed her friend's cell phone in order to send a message to another friend, a boy who lived down the street, informing him that she had been assaulted again. Her friend, the boy from down the street, then told the victim's aunt about the abuse while the aunt was babysitting the victim and her siblings that eve-

ning. The victim then told her aunt about the abuse herself. The aunt then went inside and told her fiancé, the victim's uncle, about the abuse.

The victim disclosed to her aunt and uncle that defendant had staged and taken several indecent photographs of her with his old cell phone. The victim helped her uncle locate the old phone used to take the photographs. Her uncle put the phone in his pocket, but he was unable to view the phone's contents because it was locked by a password. A short time later, the victim's mother and defendant returned home after an evening of running errands. The victim's mother had to return to the store, and the victim's uncle offered to ride with her. Defendant, presumably having noticed the general mood of the people in the house and startled by the uncle's behavior, began to frantically search for the old phone. On the way home from the store, the victim's uncle informed her mother of what the victim had told him and that he was in possession of the old phone.

When the victim's mother and uncle returned home, they both noticed defendant looking for his phone. The victim and her aunt then left the house and were in the process of getting into the uncle's car when defendant approached and asked where the victim was going on a school night. Nothing was said, and the victim went to her uncle's house for the night. Defendant repeatedly called the uncle's phone, asking to speak with the victim. Defendant then left in the mother's van, not informing anyone of where he was going. The uncle later returned to the victim's house, and the victim's mother unlocked the phone. The victim's mother and uncle verified that the pictures existed. Late the next evening or early on the day after, they filed a police report.

At trial, the prosecution presented testimony from the victim regarding the charged instances of sexual abuse, as well as her testimony that defendant took photographs of her with his cell phone. The prosecution introduced four photographs of the victim that were recovered from defendant's phone. The prosecution additionally presented text messages from the victim disclosing the abuse, as well as the testimony of witnesses who corroborated the circumstances surrounding the victim's disclosure of the abuse. The prosecution further presented the testimony of a sexual assault nurse examiner regarding her examination of the victim and the victim's statements. A jury found defendant guilty of the charged offenses.

II. ADMISSION OF PHOTOGRAPHS

Defendant argues that he was denied a fair trial by the admission of photographs depicting the 12-year-old victim's vagina, breasts, and buttocks. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). At trial, defendant objected to the prosecution's request to admit 11 photographs of the victim from defendant's phone, arguing that the photographs were more prejudicial than probative because of their graphic nature and that the evidence was not necessary because the victim could testify regarding the photographs. The trial court allowed the prosecution to introduce 4 of the proffered 11 photographs. Accordingly, defendant's evidentiary claim is preserved. However, because defendant did not raise an objection on the ground that the

admission of the photographs allegedly denied him a fair trial, his constitutional claim is unpreserved. See *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

"A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion." *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v McBurrows*, 322 Mich App 404, 411; 913 NW2d 342 (2017) (quotation marks and citation omitted). Unpreserved claims of constitutional error are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

B. ANALYSIS

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). "Exclusion is required under MRE 403 only when the danger of unfair prejudice substantially outweighs the probative value of the evidence." *People v Head*, 323 Mich App 526, 541; 917 NW2d 752 (2018). "Photographs may be used to corroborate a witness's testimony . . . ." *Id.* (cleaned up).

In ruling on the prosecution's request to admit 11 of the 45 photographs of the victim found on defendant's phone, the trial court stated that several of the photographs were "repulsive." The court ruled that the prosecution could only use the photographs in which the victim could identify defendant's hands in the photos. The court refused to admit the other photographs as cumulative and too prejudicial because tes-

timony would be sufficient. Accordingly, the court admitted only People's Exhibits 12 through 15. In each photograph, the victim identified herself or her vagina, as well as defendant's hand. With regard to the first three photographs, she testified that each was taken by defendant.

Trial courts have a duty, at times an unpleasant one, to resolve questions of the admissibility of evidence in cases that run the gamut of antisocial behavior. Doing so sometimes requires the consideration of evidence that a law-abiding member of society would find repulsive, indecent, or obscene, or rather not acknowledge exists. Were this Court to hold that evidence could be excluded for the mere reason that it was unpleasant to consider, evidence of the most probative value might then be excluded from the most heinous of cases.

> Generally, photographs that are merely calculated to arouse the sympathies or prejudices of the jury should not be admitted. However, if a photograph is otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. [*People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997) (citations omitted).]

The sexual assault of a child is condemned so strongly by society that the mere possession of photographic representations of such acts is a felony punished similarly to murder, robbery, and other serious crimes. See MCL 750.145c. The photographs in this case are shocking, indecent, and unsettling. However, they are illustrative of not only the acts depicted, but of the propensities of the individual who took them, and they were not introduced merely to shock or inflame the jurors. The photographs corroborated the victim's testimony that defendant took the photographs, given

the victim's ability to identify defendant's hands, and that he had a sexual interest in her. See *Head*, 323 Mich App at 541. They also corroborate the victim's testimony in a more general sense because they are the only direct evidence confirming any part of the victim's testimony. *Id*. Therefore, any prejudicial taint is more than overcome by their probative value, regardless of how lurid and despicable the photographs themselves may be.

Moreover, a holding that the opposite were true would require this Court to conclude that the trial court had abused its discretion in allowing the photographs to be admitted. Given the trial court's careful consideration of the photographs, its decision to vastly limit the number that could be admitted at trial, and its requirement that the victim be able to identify the defendant's hands in the admitted photographs, we instead conclude that the trial court acted well within its discretion. Although the photographs were perhaps the most wrenching of the evidence against defendant, they served merely to corroborate the testimony of the victim. *Id*. Given our holding that the photographs' probative value far outweighs any prejudice, their admission at trial was proper.

Because application of MRE 403 to any photographs that a party seeks to admit requires a balancing of factors, we emphasize that sexually explicit photographs used as evidence of a sexual assault of a minor *cannot be unfairly prejudicial per se*. As our prior decisions have indicated, and as the trial court did in this case, trial courts must weigh the prohibitive value against the danger of any unfair prejudice that admission might cause. A decision on the admissibility of photographs in such cases cannot be based solely on the

graphic nature of the photographs. See, e.g., *Howard*, 226 Mich App at 549-550; *Head*, 323 Mich App at 541.

III. QUALIFICATION OF EXPERT WITNESS

Next, defendant argues that the trial court committed errors requiring reversal by qualifying a prosecution's witness, nurse Katrina Sadowski, as an expert in sexual abuse trauma and by admitting her testimony when she was not certified by the state as a sexual assault nurse examiner (SANE). We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Defendant objected at trial to the qualification of Sadowski, but he did not object to her testimony regarding the victim's body language or the absence of injury in most sexual assault cases. Therefore, defendant preserved his challenge to Sadowski's qualification as an expert generally, but he did not preserve his remaining challenges to her testimony. See *Knox*, 469 Mich at 508; *Canter*, 197 Mich App at 563. This Court reviews for an abuse of discretion a trial court's decision on an expert's qualifications, as well as a trial court's decision to admit or exclude expert witness testimony. *People v Dixon-Bey*, 321 Mich App 490, 496; 909 NW2d 458 (2017). "Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights." *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011).

B. ANALYSIS

MRE 702 governs the admissibility of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

At trial, Sadowski testified that she held an associate's degree in nursing and a nursing license, received sexual assault training through an online course, had worked at Haven since 2009, and had performed approximately 30 examinations as a sexual assault nurse examiner. Sadowski had not yet received her state certification as a sexual assault nurse examiner because she had not been available when the test was offered. She had never written any articles and had never previously testified in court, although neither is required to qualify as an expert witness. After defendant objected to Sadowski's qualifications as an expert in forensic nursing, Sadowski further testified that the 30 examinations that she had performed were based on her forensic-nursing training, she had earned approximately 36 continuing-education credits, and she completed reports with each examination. The trial court qualified her as an expert in forensic nursing.

Defendant's primary argument is that the trial court abused its discretion by qualifying Sadowski as an expert because she had not yet received certification from the state. However, MRE 702 does not require that an expert be certified by the state in the particular area in which the expert is qualified. Rather, an expert may be qualified on the basis of "knowledge, skill, experience, training, or education . . . ." MRE 702. Sadowski, most importantly, was a certified nurse. The fact that she had yet to receive her SANE certification

does not render her incompetent as a medical professional. To require some form of certification in a specific subfield of a larger profession in order to serve as an expert witness would cause not only absurd results, but mandate the creation of new certifications any time a novel or rare issue were before a trial court.

To the extent that defendant challenges specific portions of Sadowski's testimony on grounds other than her general lack of qualification as an expert, his claims are without merit. First, defendant challenges Sadowski's testimony that genital injury is not present in most sexual-assault cases. Secondly, defendant challenges Sadowski's testimony that during her examination of the victim, the victim was "shielding herself" and "had her arms huddled around herself . . . ." Defendant points out that the prosecutor referred to this testimony in her rebuttal argument. Defendant argues that Sadowski's testimony improperly enhanced the victim's credibility by indicating that, even though there was no evidence of trauma, the victim's body language implied that the sexual assaults occurred. He further argues that Sadowski's testimony was beyond her expertise, substantially prejudicial, and without foundation.

With regard to Sadowski's testimony regarding the lack of injury in most sexual assault cases, this testimony was properly admitted because it was based on Sadowski's specialized knowledge and assisted the jury in understanding the evidence in this case. See MRE 702; see also *People v McLaughlin*, 258 Mich App 635, 657-658; 672 NW2d 860 (2003). The lack of the appearance of injury in sexual-assault cases is not a new or novel theory. Additionally, Sadowski's testimony regarding the victim's body language was not based on Sadowski's specialized knowledge, but on her

"perception of the witness." This testimony was admissible lay testimony under MRE 701, rather than as expert testimony. See *McLaughlin*, 258 Mich App at 657-658. Accordingly, the admission of Sadowski's testimony did not constitute plain error affecting defendant's substantial rights.

IV. PRESENTENCE INVESTIGATION REPORT

Finally, defendant argues that this Court should remand this matter to the trial court because the cover sheet of his presentence investigation report (PSIR) contains inaccurate information that must be corrected. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"A challenge to the validity of information contained in the PSIR may be raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand." *People v Lloyd*, 284 Mich App 703, 706; 774 NW2d 347 (2009). At the sentencing hearing, defendant objected to an error on page 6 of the PSIR, but he did not object to any alleged error on the cover sheet. Defendant has not filed a motion for resentencing or a motion to remand. Therefore, this issue is unpreserved. See *id.*; *Canter*, 197 Mich App at 563. Unpreserved claims involving the accuracy of a PSIR are reviewed for plain error affecting the defendant's substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

B. ANALYSIS

"A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy

of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997) (citations omitted). Moreover, "[t]he Department of Corrections relies on the information contained in the PSIR to make critical decisions regarding a defendant's status. Therefore, it is imperative that the PSIR accurately reflect the sentencing judge's determination regarding the information contained in the report." *Lloyd*, 284 Mich App at 705-706 (citations omitted).

Defendant claims that the cover sheet of his PSIR improperly lists his sentences for Counts 2 and 3 as "LIFE." Defendant is correct that the trial court did not sentence him to life imprisonment on Counts 2 and 3, but rather to 10 to 40 years in prison for each count, as reflected in the amended judgment of sentence. Nonetheless, defendant has not demonstrated an error on the cover sheet of the PSIR. The PSIR is prepared before sentencing; therefore, it cannot contain information regarding the sentence imposed by the court at the sentencing hearing. See MCL 771.14. This is supported by the fact that the "Criminal History" section of the PSIR leaves blank the sentences for defendant's current offenses. Although the cover sheet refers to the "Max" sentence, it apparently lists, and informed the trial court of, the maximum sentence *possible* for each of defendant's current convictions, which was life imprisonment for Counts 1, 2, and 3. See MCL 750.520b(2). Accordingly, defendant fails to establish any plain error on the cover sheet of the PSIR.

V. CONCLUSION

Affirmed.

MURRAY, C.J., and BORRELLO, J., concurred with RONAYNE KRAUSE, J.

LEBENBOM v UBS FINANCIAL SERVICES, INC

Docket No. 340973. Submitted October 10, 2018, at Detroit. Decided October 23, 2018, at 9:05 a.m.

Marjorie Lebenbom brought an action in the Oakland Circuit Court against UBS Financial Services, Inc., alleging statutory conversion and common-law conversion following defendant's alleged erroneous removal of funds from plaintiff's brokerage account. Plaintiff had created a revocable trust in 1979 that opened an account with defendant. On July 5, 2016, defendant received a tax compliance levy from the New York State Department of Tax and Finance, and the judgment debtor listed on the levy was plaintiff's husband. According to plaintiff, defendant then restricted plaintiff's access to the funds in her account, which left plaintiff without the ability to pay her utility bills and other monthly expenses. Plaintiff alleged that defendant had previously received multiple levies identical to the levy received in July 2016; however, defendant had released the funds in plaintiff's account each time after determining that the levies were directed to plaintiff's husband. On July 29, 2016, defendant allegedly removed $156,130.22 from plaintiff's account without plaintiff's written authorization. The levy was finally released on September 28, 2016. Defendant moved for summary disposition or, in the alternative, sought an order from the trial court compelling arbitration pursuant to MCR 3.602 because plaintiff had signed a form that contained an arbitration agreement. The form provided, in pertinent part, that plaintiff agreed to submit to arbitration "any and all controversies which may arise" between defendant and plaintiff "concerning any account, transaction, [or] dispute" by virtue of carrying an account with defendant. Plaintiff responded that the Financial Industry Regulatory Authority (FINRA), the forum in which the claims would be arbitrated, did not have the authority to arbitrate her claims and that the arbitration clause did not encompass her claims alleging wrongful conversion against defendant. Following a hearing, the court, Daniel P. O'Brien, J., denied defendant's motion. Defendant appealed.

The Court of Appeals *held*:

1. When determining whether the parties agreed to arbitrate a certain matter, courts should ordinarily apply basic state-law principles that govern the formation of contracts. Because of the strong federal policy promoting arbitration, when an ambiguity exists with regard to whether a specific matter falls within the scope of arbitration, that ambiguity is to be resolved in favor of submitting the matter to the arbitrator. To determine whether a claim is subject to arbitration, the court must review the arbitration clause and determine whether the subject matter of the dispute is covered by the arbitration clause. In this case, both parties acknowledged that the arbitration form did not provide any guidance with respect to which issues may constitute "controversies" as set forth in the agreement. A review of dictionary definitions of "controversies," "account," "transaction," and "dispute" revealed that plaintiff's claims should be arbitrated. There was a controversy with respect to transactions relating to plaintiff's brokerage account given that the allegations pertained to defendant's handling of the funds in the account. Because the plain language of the arbitration agreement was clear concerning the issue of which matters are subject to arbitration, it was not open to question whether plaintiff's claims should be arbitrated. Additionally, the terms of the arbitration agreement were not ambiguous because they were not susceptible to more than one meaning and were not in irreconcilable conflict with each other. Instead, a review of the arbitration agreement revealed that the parties did agree that "any and all controversies" would be submitted to and decided by arbitration.

2. In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists when the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists when the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable when the inequity of the term is so extreme as to shock the conscience. In this case, there was nothing in the language of the arbitration clause that could be construed as inherently unreasonable or shocking to the conscience; therefore, substantive unconscionability did not exist. Procedural unconscionability likewise did not exist; while there was evidence that plaintiff was not informed about the arbitra-

tion clause or asked to consent to its inclusion in the brokerage agreement, Michigan law is clear that a party who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents. Additionally, there was nothing to suggest that plaintiff, as the weaker party, had no realistic alternative to the acceptance of the disputed terms. Accordingly, plaintiff's argument that the arbitration clause was unconscionable was unavailing.

3. A court's authority to determine questions related to the parties' agreement to arbitrate is limited and only extends to "threshold" or "gateway" questions related to arbitration, including the question whether the parties even agreed to arbitrate. In contrast, procedural matters that arise out of the dispute and are relevant to its final disposition are considered subsidiary issues that are reserved to the arbitrator, unless there is language in the contract reflecting that the arbitrator is not to decide these issues. Section 12200 of the FINRA Code of Arbitration provides that parties must arbitrate a dispute under the code if arbitration is either required by a written agreement or requested by the customer, the dispute is between a customer and a member or associated person of a member, and the dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company. Neither the Michigan Court of Appeals nor the Michigan Supreme Court has decided the issue whether the trial court or the arbitrator has the authority to determine if the requirements of § 12200 are met. However, turning to United States Supreme Court precedent, the issue whether the dispute between plaintiff and defendant can be arbitrated pursuant to § 12200 is a question to be determined in the FINRA arbitration proceedings. The interpretation of whether the requirements of § 12200 have been satisfied did not fall within the limited scope of a question of arbitrability, and the present case did not present a narrow circumstance in which the parties likely would have expected a court to decide this matter. The arbitration clause in this case was broadly worded to include "any and all controversies" that arose between the parties, and the risk of forcing the parties to arbitrate a dispute that they did not agree to arbitrate was not present in this case. Additionally, the requirement that the parties establish that the dispute arose in conjunction with defendant's business activities before submitting the matter to arbitration can be characterized as a procedural condition precedent to arbitration because that inquiry will be determinative of when the contractual duty to arbitrate arises,

not whether it exists at all. Finally, a FINRA arbitrator is better equipped to determine whether plaintiff and defendant's dispute arose in connection with defendant's business activities, and therefore this recognition of the arbitrator's expertise gave further support for the conclusion that the interpretation of § 12200 is best left to the arbitrator. Accordingly, to the extent the trial court determined that FINRA did not have authority to arbitrate this dispute pursuant to § 12200, which was not a "gateway" question reserved to the trial court, this determination was erroneous and warranted reversal.

Reversed and remanded for entry of an order compelling the case to arbitration.

ARBITRATION — FINANCIAL INDUSTRY REGULATORY AUTHORITY CODE OF ARBITRATION — DISPUTES REGARDING AGREEMENTS TO ARBITRATE.

Section 12200 of the Financial Industry Regulatory Authority Code of Arbitration provides that parties must arbitrate a dispute under the code if arbitration is either required by a written agreement or requested by the customer, the dispute is between a customer and a member or associated person of a member, and the dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company; the issue whether a dispute can be arbitrated pursuant to § 12200 is a question to be determined in the arbitration proceedings.

Weininger Law, PLLC (by *Daniel W. Weininger*) for plaintiff.

Saretsky Hart Michaels & Gould PC (by *Eric A. Michaels* and *Janine M. Lucas*) for defendant.

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. Defendant appeals as of right the trial court's order denying its motion for summary disposition sought pursuant to MCR 2.116(C)(7) or, in the alternative, to compel arbitration pursuant to MCR 3.602. We reverse and remand for proceedings consistent with this opinion.

I. FACTS

This appeal follows defendant's alleged action of erroneously removing funds from plaintiff's brokerage account in July 2016. The facts in this case are largely undisputed. In a two-count complaint filed May 26, 2017, plaintiff alleged statutory conversion and common-law conversion against defendant. According to the allegations in the complaint, plaintiff created a revocable trust on November 2, 1979, and the trust opened an account with defendant at its location in Birmingham, Michigan. On July 5, 2016, defendant received a "[t]ax [c]ompliance [l]evy . . . from the New York State Department of Tax and Finance . . . ." The judgment debtor listed on the levy was plaintiff's husband, Milton Lebenbom. According to plaintiff, "[i]n response to this facially defective levy, [defendant] completely restricted [plaintiff's] access to all of the funds" in her account. Plaintiff's counsel contacted defendant on July 13, 2016, requesting that defendant release "the unlawful restrictions" on the funds because the funds had been incorrectly frozen. Plaintiff further alleged that from July 5, 2016 until September 29, 2016, she did not have access to the funds in her account and that defendant did not provide any information with respect to when the hold on the account would be released. As a result, during that period, plaintiff was left without monetary resources to pay her utility bills or other monthly expenses. Plaintiff stated that defendant had received an "identical levy" from the New York State Department of Tax and Finance in February 2011 and that after freezing plaintiff's assets at that time, "[defendant] expeditiously released her funds after determining that the levy was intended [for plaintiff's husband]." According to the

complaint, defendant had, in fact, received multiple levies identical to the levy received in July 2016 but each time had released the funds in plaintiff's account after determining that the levies were directed to plaintiff's husband. On July 29, 2016, defendant allegedly removed $156,130.22—an amount that doubled the amount of the tax levy—from plaintiff's account without plaintiff's written authorization. Finally, on September 28, 2016, after the New York State Department of Tax and Finance concluded that the levy could not attach to assets held in plaintiff's name, the levy was released.

After plaintiff filed her complaint, in lieu of filing an answer, defendant moved for summary disposition pursuant to MCR 2.116(C)(7). In the alternative, defendant sought an order from the trial court compelling arbitration pursuant to MCR 3.602. In its brief in support, defendant argued that summary disposition was appropriate because on July 20, 2004, plaintiff signed an Account Services Selection form that contained an arbitration agreement. Accordingly, defendant claimed that summary disposition should be granted because of the parties' agreement to arbitrate. In support of its motion, defendant included the form, and the portion of the form captioned "Client Agreement" contained the following language regarding arbitration:

> **BY SIGNING BELOW ACCOUNT HOLDER UNDERSTANDS[,] ACKNOWLEDGES AND AGREES**
>
> * * *
>
> **B that in accordance with the last paragraph of the Master Account Agreement entitled "Arbitration" the Account Holder agrees in advance to arbitrate any controversies which may arise with[,]**

among others[,] UBS Financial Services in accordance with the terms outlined therein[.][1]

The Master Account Agreement (MAA) provides the following with respect to arbitration:

Arbitration

- **Arbitration is final and binding on the parties.**
- **The parties are waiving their right to seek remedies in court, including the right to jury trial.**
- **Pre-arbitration discovery is generally more limited than and different from court proceedings.**
- **The arbitrator's award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.**
- **The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.**
- **Client agrees, and by carrying an account for Client UBS Financial Services agrees that, any and all controversies which may arise between UBS Financial Services, any of UBS Financial Services' employees or agents and Client concerning any account, transaction, dispute or the construction, performance or breach of this Agreement or any other agreement, whether entered into prior to, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this Agreement shall be held under and pursuant to**

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[1] The Client Agreement portion of the Account Services Selection form also provides that plaintiff "has received and read a copy of this Client Agreement and attached Master Account Agreement (which contains a copy of this Paragraph for Account Holder reference) and agree[s] to be bound by the terms and conditions contained therein (which terms and conditions are hereby incorporated by reference)[.]"

> **and be governed by the Federal Arbitration Act, and shall be conducted before an arbitration panel convened by the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. Client may also select any other national securities exchange's arbitration forum in which UBS Financial Services is legally required to arbitrate the controversy with Client, including, where applicable, the Municipal Securities Rulemaking Board. Such arbitration shall be governed by the rules of the organization convening the panel. Client may elect in the first instance the arbitration forum, but if Client fails to make such election by certified mail, return receipt requested, or telegram addressed to UBS Financial Services at its main office, and to the attention of the Legal Department, before the expiration of five (5) days after receipt of a written request from UBS Financial Services to make such election then UBS Financial Services may make such election. The award of the arbitrators, or of the majority of them, shall be final, and judgment on the award rendered may be entered in any court of competent jurisdiction.**

In her response to the motion, plaintiff claimed that FINRA,[2] the forum in which the claims would be arbitrated, did not have the authority to arbitrate her claims and that the arbitration clause did not encompass her claims alleging wrongful conversion against defendant. Plaintiff also asserted that the terms of the arbitration clause were ambiguous. In its reply brief, defendant maintained that arbitration was required by FINRA and that plaintiff's claims fell within the confines of the arbitration clause. After conducting a

[2] FINRA is an acronym for the Financial Industry Regulatory Authority.

hearing on defendant's motion, the trial court denied the motion. Defendant now appeals as of right.

II. SCOPE OF THE ARBITRATION AGREEMENT

Defendant first argues that the trial court erred by determining that the parties' arbitration clause does not encompass plaintiff's claims alleging conversion against defendant. We agree.

A. STANDARD OF REVIEW

In *Galea v FCA US LLC*, 323 Mich App 360, 368; 917 NW2d 694 (2018), this Court recently set forth the standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(7):

> We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Hicks v EPI Printers, Inc*, 267 Mich App 79, 84; 702 NW2d 883 (2005). A motion under MCR 2.116(C)(7) is appropriately granted when a claim is barred by an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. at 119. However, "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. Whether an arbitration agreement exists and is enforceable is a legal question that we review de novo. *Hicks*, 267 Mich App at 84.

Questions regarding the interpretation of contractual language are reviewed de novo. *VHS Huron Valley-Sinai Hosp, Inc v Sentinel Ins Co (On Remand)*, 322 Mich App 707, 715; 916 NW2d 218 (2018).

B. ANALYSIS

The pivotal issue to be resolved in this appeal is whether the arbitration clause in the parties' MAA encompasses plaintiff's claims against defendant to the extent that plaintiff's claims are barred by the agreement to arbitrate. As an initial matter, the parties do not dispute that this case is governed by the Federal Arbitration Act (FAA), 9 USC 1 *et seq*. State courts are mandated, pursuant to the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, to adhere to the FAA's substantive provisions. *Abela v Gen Motors Corp*, 257 Mich App 513, 524; 669 NW2d 271 (2003), aff'd 469 Mich 603 (2004).

In *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998), this Court, citing precedent from the United States Supreme Court,[3] recognized that when determining "whether the parties agreed to arbitrate a certain matter, courts should ordinarily apply basic state-law principles that govern the formation of contracts."

> " 'The cardinal rule in the interpretation of contracts is *to ascertain the intention of the parties*.' " *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209; 220 NW2d 664 (1974), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) (emphasis in *Goodwin*). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). [*Amtower (On Remand)*, 232 Mich App at 234.]

Recognizing the "strong federal policy promoting arbitration," the *Amtower* Court instructed that when an ambiguity may exist with regard to whether a specific

[3] The *Amtower* Court cited *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944; 115 S Ct 1920; 131 L Ed 2d 985 (1995).

matter "falls within the scope of arbitration," that ambiguity is to be resolved in favor of submitting the matter to the arbitrator. *Id*. at 234-235. Viewed against the backdrop of the presumption that a dispute should be subject to arbitration, " ' "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," ' " doubts regarding whether a dispute is arbitrable are " ' "resolved in favor of coverage." ' " *Id*. at 235, quoting *AT&T Technologies, Inc v Communications Workers of America*, 475 US 643, 650; 106 S Ct 1415; 89 L Ed 2d 648 (1986), in turn quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960).

More recently, this Court has highlighted that arbitration presents a contractual matter between the parties and that parties will not be required to arbitrate matters that they did not agree to submit to an arbitrator. Specifically, in *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016), this Court stated, in pertinent part, as follows:

> "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc v Kaplan*, 514 US 938, 943; 115 S Ct 1920; 131 L Ed 2d 985 (1995). In other words, " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 83; 123 S Ct 588; 154 L Ed 2d 491 (2002), quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). "In this endeavor, as with any other contract, the parties' intentions control." *Stolt-Nielsen S A v Animal-*

> *Feeds Int'l Corp*, 559 US 662, 682; 130 S Ct 1758; 176 L Ed 2d 605 (2010) (quotation marks and citations omitted).

Likewise, the Michigan Supreme Court has recognized that the party seeking to avoid the arbitration agreement bears the burden of establishing that his or her claims fall outside the ambit of the arbitration agreement. *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016). Moreover, when deciphering whether plaintiff's claims are covered by the parties' arbitration clause, this Court is not permitted to analyze "the substantive merits" of plaintiff's claims. *Id*. at 296. Rather, if the dispute is subject to arbitration, the merits of the dispute are left to the arbitrator to decide. *Id*.

As we undertake an analysis of whether plaintiff's claims are subject to arbitration, we must review the arbitration clause and determine "whether *the subject matter* of the instant dispute is covered by the arbitration clause." *Id*. To answer this question, we must first turn to the plain language of the arbitration agreement. *Id*. at 299. Notably, the Michigan Supreme Court has articulated that a reviewing court must "look beyond the mere procedural labels to determine the exact nature of the claim" to avoid "artful pleading." *Id*. at 299-300 (quotation marks and citation omitted). If plaintiff's claims can be characterized as "arguably" falling within the confines of the arbitration clause, any doubts are resolved in favor of arbitration and the trial court should have granted defendant's motion to compel arbitration. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 500; 591 NW2d 364 (1998).

As set forth earlier, the parties' arbitration agreement provides, in pertinent part, as follows:

> **Client agrees, and by carrying an account for Client UBS Financial Services agrees that, any and all controversies which may arise between UBS Financial Services, any of UBS Financial Services' employees or agents and Client concerning any account, transaction, dispute or the construction, performance or breach of this Agreement or any other agreement, whether entered into prior to, on or subsequent to the date hereof, shall be determined by arbitration.**

C. DICTIONARY DEFINITIONS

On appeal, plaintiff, pointing to the definition of "account" from *Black's Law Dictionary* (7th ed) defining account as involving "[a] course of business dealings or other relations for which records must be kept," argues that her claims of wrongful conversion are not subject to arbitration because the parties' business relationship is not implicated. Turning to the definition of "property" set forth in the MAA, plaintiff also contends that any disputes that arose between plaintiff and defendant involved "property" as opposed to her account.[4] Plaintiff also claims that her allegations do not implicate a "transaction" as set forth in the arbitration clause, because a transaction, as defined by *Merriam-Webster's Online Dictionary*, is "an exchange or transfer of goods, services, or funds" or the "act or process of doing business with another person." In a subtle nuance to this argument, plaintiff contends that a "transaction" did not occur because she is not alleg-

[4] The MAA defines property in the following manner:

> "Property" includes, but is not limited to, securities, money, stocks, options, bonds, notes, futures contracts, commodities, commercial paper, certificates of deposit and other obligations, contracts, all other property usually and customarily dealt in by brokerage firms and any other property that can be recorded in any of Client's accounts with UBS Financial Services.

ing that defendant "exchange[d] or transfer[ed] . . . funds" between itself or plaintiff or the New York State Department of Tax and Finance. In her final argument with regard to the undefined terms in the arbitration clause, plaintiff asserts that (1) any dispute subject to arbitration is limited to matters that contest the subject matter of the MAA itself and (2) that the arbitration clause's use of the word "dispute" is redundant because both "dispute" and "controversies" have the same meaning. While plaintiff's arguments that the arbitration clause's terms do not evince an intention by the parties to subject plaintiff's claims to arbitration are novel and creative, they are not supported by a review of the plain language of the contract.

As a preliminary matter, as both parties acknowledge on appeal, the MAA does not provide any guidance with respect to what issues may constitute "controversies" as set forth in the agreement. In an effort to determine the plain and ordinary meaning of words used in a contract, this Court may refer to dictionary definitions. *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines a "controversy" as a "discussion marked esp. by the expression of opposing views[.]" The *New Oxford American Dictionary* (3d ed) similarly defines "controversy" as a "disagreement, typically when prolonged, public, and heated[.]" Moreover, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines a "dispute" as "to engage in argument," "to call into question," and "to contend over[.]" The *New Oxford American Dictionary* (3d ed) defines "dispute" as "a disagreement, argument, or debate[.]" Likewise, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines a "transaction" as "something transacted" and elaborates that it is the "exchange or transfer of goods, services, or funds,"

or "an act, process, or instance of transacting[.]" The *New Oxford American Dictionary* (3d ed) defines "transaction" as "the action of conducting business." Finally, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines an "account" as "a record of debit and credit entries to cover transactions involving a particular item or a particular person or concern[.]" The *New Oxford American Dictionary* (3d ed) defines an "account" as "a report or description of an event or experience[.]"

After reviewing these dictionary definitions of "controversies," "account," "transaction," and "dispute," it is evident to us that plaintiff's allegations in her complaint present claims that should be arbitrated. For example, there is a controversy with respect to transactions relating to plaintiff's brokerage account given that the thrust of the allegations in her complaint pertain to defendant's handling of the funds in her account. More specifically, because plaintiff is alleging that defendant wrongfully froze and withheld funds held in her brokerage account from her after receiving the tax levy and transferred a portion of those funds to another account, these allegations certainly present a disagreement between the parties with respect to whether defendant's actions were lawful and warranted. Put another way, both parties hold strong opposing views on the subject of defendant's actions with regard to plaintiff's account and disagree with respect to whether defendant's actions were lawful and appropriate, particularly with regard to whether defendant ought to have taken such actions when the name of plaintiff's husband, as opposed to plaintiff herself, was included on the tax levy. Accordingly, because the plain language of the arbitration agreement is clear concerning the issue of which matters are subject to arbitration, it is not open to question

whether plaintiff's claims should be arbitrated. Put simply, interpreting the arbitration clause in a broad manner that effectuates the presumption in favor of arbitration, *DeCaminada*, 232 Mich App at 499,[5] plaintiff's claims alleging wrongful conversion against defendant specifically present "controversies which may arise between [defendant] . . . and [plaintiff] concerning any account, transaction, [or] dispute . . . ." Our conclusion that plaintiff's claims are subject to arbitration according to the plain terms of the contract is buttressed by the fact that the parties' contract does not provide "positive assurances" that the arbitration clause would not cover claims of wrongful conversion in the nature of what plaintiff is alleging in the present appeal. *AFSCME, Council 25, AFL-CIO v Hamtramck Housing Comm*, 290 Mich App 672, 675; 804 NW2d 120 (2010).[6]

D. AMBIGUITY

To the extent that plaintiff argues that the terms of the arbitration clause are ambiguous, this argument is

[5] In *DeCaminada*, this Court expressly declined to adopt a "very narrow reading" of the arbitration clause at issue when to do so would undermine the presumption in favor of arbitration. *DeCaminada*, 232 Mich App at 499. See also *Amtower (On Remand)*, 232 Mich App at 233 n 5 (observing that "arbitration clauses are to be liberally construed with any doubts to be resolved in favor of arbitration").

[6] Other panels of this Court have found similarly broadly worded arbitration clauses to encompass the parties' claims. See, e.g., *DeCaminada*, 232 Mich App at 499 (concluding that the plaintiff's claims of age discrimination and conversion were encompassed by an arbitration clause requiring the parties to arbitrate claims " 'arising out of . . . the practice, business or affairs of [the defendant] . . . .' "); *Amtower (On Remand)*, 232 Mich App at 236 (concluding that a broadly worded arbitration clause "covering . . . *any* controversy arising between the parties" reflects that the arbitration was to decide any issues concerning the timeliness of the plaintiff's claims).

also not persuasive.[7] Contractual terms can only be characterized as ambiguous if "equally susceptible to more than a single meaning" or if in irreconcilable conflict with other provisions of the contract. *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40 n 18; 892 NW2d 794 (2017). As this Court recently observed in *Magley v M & W, Inc*, 325 Mich App 307, 317-318; 926 NW2d 1 (2018), this Court must read the contract as a whole, and the words in the contract are to be understood in context. "Courts must give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Id*. at 318 (quotation marks and citation omitted). An unambiguous contract is to be enforced as written, and the mere fact that contractual terms are "[i]nartfully worded or clumsily arranged" will not necessarily lead to a finding that a contract is ambiguous "if it fairly admits of one interpretation." *Id*. (quotation marks and citation omitted).

In the present case, the contractual terms at issue in the arbitration clause of the MAA are not equally susceptible to more than one meaning, and the contractual terms are not in irreconcilable conflict with each other. *Barton-Spencer*, 500 Mich at 40 n 18. Instead, a review of the MAA, read as a whole and affording the words used in the contract a contextual understanding, reflects that the parties, by entering into the agreement, did agree that any and all contro-

[7] In her brief on appeal, plaintiff does not fully develop a legal argument with respect to why she asserts that the contractual terms are ambiguous; instead, she urges this Court to remand this case to the trial court for discovery and a separate trial to determine (1) the circumstances regarding plaintiff's execution of the Account Services Selection form and (2) whether plaintiff intended to submit potential conversion claims to arbitration.

versies that arose between plaintiff and defendant concerning any account, dispute, or transaction would be submitted to and decided by arbitration. Under these circumstances, plaintiff's allegation that the contractual terms are ambiguous is unavailing.

E. UNCONSCIONABILITY

Plaintiff also argues on appeal that the arbitration clause is invalid because it is unconscionable. To the extent this issue was not squarely raised in and decided by the trial court, it is not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, this Court may address unpreserved issues when the question presented is one of law and the facts necessary to the resolution of the issue have been presented. *Elahham v Al-Jabban*, 319 Mich App 112, 120; 899 NW2d 768 (2017). In *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143-144; 706 NW2d 471 (2005), this Court set forth the governing legal principles in determining whether a contract is procedurally and substantively unconscionable:

> In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. [Citations omitted.]

As an initial matter, addressing first the component of substantive unconscionability, there is nothing in the language of the arbitration clause that can be construed as "inherently unreasonable" or such that it "shocks the conscience." *Id*. at 144. Instead, the arbitration clause contains a mandatory arbitration provision for all controversies arising between the parties. While plaintiff may be now displeased with the fact that she agreed to this provision by signing the Account Selection Services form, there is nothing in the plain language of the arbitration clause that leads us to conclude that it is so "extreme" that it can be said to be substantively unconscionable. *Id*. Under these circumstances, while the plain language of the arbitration clause is not advantageous to plaintiff, her argument that the arbitration clause is substantively unconscionable is unavailing. See *Vittiglio v Vittiglio*, 297 Mich App 391, 404; 824 NW2d 591 (2012) (recognizing that even though a contract is disadvantageous to a party, this will not result in a finding of substantive unconscionability).

Turning to procedural unconscionability, such a circumstance exists "where the weaker party had no realistic alternative to acceptance of the [disputed] term." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009) (quotation marks and citation omitted). While there is evidence in the record, in the form of plaintiff's September 5, 2017 affidavit, that plaintiff was presented with a form by defendant's employees that she thought was a form to complete for free checks and that plaintiff was not informed about the arbitration clause or asked to consent to its inclusion in her brokerage agreement with defendant, Michigan law is clear that a party who signs an agreement, "in the absence of coercion, mistake, or fraud, is presumed to know the nature of the

document and to understand its contents . . . ." *Clark*, 268 Mich App at 144-145. Additionally, while plaintiff is a sympathetic figure because of her advanced age, there is nothing in the record to suggest that she, as the weaker party in this dispute, "had no realistic alternative to acceptance of the [disputed] term[s]." *Liparoto*, 284 Mich App at 30 (quotation marks and citation omitted).

III. AUTHORITY OF FINRA

Defendant next argues that the trial court erred by determining that FINRA did not have authority to arbitrate plaintiff's claims. We agree.

In the trial court, plaintiff argued that FINRA did not have authority to arbitrate plaintiff's claims because the requirements of § 12200 of the FINRA Code of Arbitration were not satisfied. This rule provides:

> Parties must arbitrate a dispute under the Code if:
>
> - Arbitration under Code is either:
>
> (1) Required by a written agreement, or
>
> (2) Requested by the customer;
>
> - The dispute is between a customer and a member or associated person of a member; and
> - The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company. [FINRA Code, § 12200.]

Before we can properly decide whether the trial court correctly concluded that FINRA cannot arbitrate plaintiff's claims when the requirements of FINRA Code of Arbitration § 12200 were not met, we must first determine whether this was even a question that the trial court could decide. Notably, while plaintiff and

defendant hotly contest whether FINRA has the authority to consider and arbitrate plaintiff's claims against defendant, neither party has addressed the important, preliminary issue whether the trial court could decide the question of FINRA's authority to arbitrate the dispute. In *Bienenstock*, this Court, citing the United States Supreme Court's decision in *Howsam*, 537 US at 83, recognized that a court's authority to determine questions related to the parties' agreement to arbitrate is limited and only extends to "threshold" or "gateway" questions related to arbitration. *Bienenstock*, 314 Mich App at 515-516. For example, such "gateway questions" reserved to the courts have been held to include the initial inquiry of whether the parties even agreed to arbitrate. *Id*. at 516.

> Examples of gateway or arbitrability issues "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " [*BG Group PLC v Republic of Argentina*, 572 US 25, 34; 134 S Ct 1198; 188 L Ed 2d 220 (2014)], quoting *Howsam*, 537 US at 84. [*Bienenstock*, 314 Mich App at 516.]

In contrast, procedural matters that arise out of the dispute and are relevant to its final disposition are considered subsidiary issues that are reserved to the arbitrator, unless there is language in the contract reflecting that the arbitrator is not to decide these issues. *Id*.

> In other words, "the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *BG Group*, 572 US at [34]; 134 S Ct at 1207. Examples of procedural questions for the arbitrator to decide include "whether the first two steps of a grievance procedure were completed, where these steps are prereq-

> uisites to arbitration," and "allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam*, 537 US at 84 (quotation marks and citations omitted; alteration in original). When the issue presented is close and "there is doubt" about whether an issue is a gateway question for the court or a procedural one for the arbitrator, "we should resolve that doubt in favor of arbitration." *Green Tree Financial Corp v Bazzle*, 539 US 444, 452; 123 S Ct 2402; 156 L Ed 2d 414 (2003) (plurality decision; opinion by Breyer, J.) (quotation marks omitted), citing *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626; 105 S Ct 3346; 87 L Ed 2d 444 (1985). [*Bienenstock*, 314 Mich App at 516-517.]

In *Howsam*, the United States Supreme Court was asked to consider an arbitration rule of the National Association of Securities Dealers (NASD). *Howsam*, 537 US at 81. The rule at issue provided that a dispute was not eligible for arbitration after six years had elapsed from the occurrence or event giving rise to the dispute. *Id*. In determining whether a court or an arbitrator should decide the issue, the United States Supreme Court ruled that the issue was reserved to the arbitrator. *Id*. The *Howsam* Court provided beneficial guidance with respect to deciphering between what constitutes a gateway question of arbitrability for the courts to decide as opposed to procedural issues that ought to be left to the arbitrator. *Id*. at 83-84. In setting forth principles regarding what constitutes a question of arbitrability, the *Howsam* Court ruled, in pertinent part, as follows:

> Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope. See [*First*

> *Options of Chicago*, 514 US at 942]. The Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate. [*Howsam*, 537 US at 83-84.]

In contrast, questions of arbitrability do not arise in circumstances where "parties would likely expect that an arbitrator would decide the [question]." *Id*. at 84. Such matters are those that arise out of the dispute and bear on its ultimate disposition. *Id*. In so ruling, the *Howsam* Court observed that the Revised Uniform Arbitration Act of 2000 encompassed the holdings of state courts and the law developed pursuant to the FAA and specified that arbitrators should decide whether a condition precedent to submitting a matter to arbitration has been completed. *Id*. at 85. Concluding that the issue of the NASD time limit "falls within the class of gateway procedural disputes" that do not implicate questions of arbitrability and should be left to the arbitrator, the *Howsam* Court ruled, in pertinent part, as follows:

> Moreover, the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding. Cf. [*First Options of Chicago*, 514 US at 944-945]. And for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike. [*Howsam*, 537 US at 85.]

In *Granite Rock Co v Int'l Brotherhood of Teamsters*, 561 US 287, 296; 130 S Ct 2847; 177 L Ed 2d 567 (2010), the United States Supreme Court articulated that "where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." Specifically, the *Granite Rock Co* Court stated:

> These unusual facts[8] require us to reemphasize the proper framework for deciding when disputes are arbitrable under our precedents. Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. See *First Options* [*of Chicago*, 514 US at 943]; *AT&T Technologies*, [475 US at 648-649]. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. See, *e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Where there is no provision validly committing them to an arbitrator, see *ante*, at 2776-2778, these issues typically concern the scope of the arbitration clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include when that agreement was formed. [*Granite Rock Co*, 561 US at 297.]

More recently, in *BG Group PLC*, 572 US at 28-29, the United States Supreme Court considered whether interpretation of a contractual provision regarding arbitration in a treaty between the United Kingdom and Argentina presented a substantive gateway issue for the courts to determine or a procedural matter best reserved to the arbitrator.[9] Noting that the "text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration," the

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[8] *Granite Rock Co* involved a question concerning the ratification of a collective bargaining agreement. *Granite Rock Co*, 561 US at 297.

[9] The provision at issue provided for arbitration:

Court recognized that the provision "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all." *Id*. at 35. The *BG Group PLC* Court further explained why the rule was a matter of procedure, characterizing it as "a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute." *Id*. at 35-36. Given that the treaty between the parties did not indicate that the "provision is to operate as a substantive condition on the formation of the arbitration contract, or that it is a matter of such elevated importance that it is to be decided by courts," the United States Supreme Court concluded that the interpretation and application of the provision was best left to the arbitrators. *Id*. at 40-41. Importantly, the *BG Group PLC* Court expressly recognized that "[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations regarding the operation of the provision." *Id*. at 40.

Turning to Michigan precedent, our research has not yielded a published case in which this Court or the Michigan Supreme Court has specifically decided the issue whether the trial court or the arbitrator has the authority to determine if the requirements of § 12200 are met. In *Bienenstock*, this Court undertook a thorough review of the distinction between gateway issues for the Court and procedural issues for the arbitrator;

> (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision; [or]
>
> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute. [*BG Group PLC*, 572 US at 28 (quotation marks and citation omitted; alteration by the *BG Group PLC* Court).]

the question on appeal was whether "a trial court judge or an arbitrator is the appropriate one to decide whether multiple arbitrations should be consolidated when the contract does not speak to the issue." *Bienenstock*, 314 Mich App at 514, 515-516. See also *Gregory J Schwartz & Co, Inc v Fagan*, 255 Mich App 229, 232; 660 NW2d 103 (2003) (citing *Howsam* and recognizing that arbitrators are in a better position of expertise to interpret the meaning of their own rules).

However, having considered the United States Supreme Court precedent, we conclude that whether the dispute between plaintiff and defendant can be arbitrated pursuant to § 12200 is a question to be determined in the FINRA arbitration proceedings. Specifically, when the parties disagree regarding (1) whether the existence of a written agreement settles the question of whether the dispute should be arbitrated pursuant to § 12200 and (2) whether the dispute arises in connection with defendant's "business activities" as set forth in § 12200, this Court has instructed that if there is a doubt concerning whether a matter presents a gateway issue or a procedural question, any doubt is resolved in favor of arbitration. *Bienenstock*, 314 Mich App at 516-517. Moreover, the interpretation of whether the requirements of § 12200 have been satisfied does not fall within the "limited scope" of a question of arbitrability, and the present case does not present "narrow circumstance[s]" in which the parties would likely have expected a court to decide this matter. *Howsam*, 537 US at 83. This is particularly so given that the MAA is broadly worded to include "any and all controversies" that arise between the parties within its ambit. Additionally, because the parties' contract reflects their agreement to arbitrate all controversies arising between them, the risk of forcing the parties to arbitrate a dispute that they did not agree to

arbitrate is simply not present in this case. *Id*. at 83-84. Also, the requirement that the parties establish that the dispute arose in conjunction with defendant's business activities before submitting the matter to arbitration can be characterized as a "procedural condition precedent" to arbitration, because such an inquiry will be determinative of when the contractual duty to arbitrate arises, not whether it exists at all. *BG Group PLC*, 572 US at 35. Similarly, as the United States Supreme Court has recognized, a FINRA arbitrator is better equipped to determine whether plaintiff and defendant's dispute arose "in connection with" defendant's business activities, and therefore this recognition of the arbitrator's expertise provides further support for the conclusion that the interpretation of § 12200 is best left to the arbitrator. *BG Group PLC*, 572 US at 40; *Howsam*, 537 US at 85. Accordingly, to the extent the trial court determined that FINRA did not have authority to arbitrate this dispute pursuant to FINRA Code of Arbitration, § 12200, which was not a "gateway" question reserved to the trial court, this determination was erroneous and warrants reversal.

IV. CONCLUSION

We reverse the trial court's order denying defendant's motion for summary disposition or, in the alternative, to compel arbitration, and we remand for entry of an order compelling the case to arbitration. We do not retain jurisdiction.

O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

TM v MZ (ON REMAND)

Docket No. 329190. Submitted September 11, 2018, at Detroit. Decided October 23, 2018, at 9:10 a.m.

TM petitioned the St. Clair Circuit Court for an ex parte personal protection order (PPO) against respondent, MZ, requesting that the court issue the PPO under MCL 600.2950a(12) and MCR 3.705(A) because respondent had allegedly harassed petitioner by posting negative and inflammatory comments about her online. The comments included calling petitioner a criminal, asserting that petitioner hid criminals and that respondent had seen in petitioner's driveway a car similar to one used by an identified kidnapper, stating derogatory things about the death of petitioner's son, and criticizing petitioner's parenting abilities. According to petitioner, respondent posted the public and private messages to terrorize, intimidate, threaten, or harass her. The court, John D. Tomlinson, J., granted petitioner's request and issued the PPO, prohibiting respondent from stalking petitioner as defined under MCL 750.411h and MCL 750.411i and from posting a message about petitioner through the use of any medium of communication, including the Internet or a computer, pursuant to MCL 750.411s. Respondent moved to terminate the PPO, arguing that the PPO should be terminated because there were no allegations of any physical contact between the parties or threats of violence made by respondent against petitioner and because the PPO impermissibly infringed his First Amendment right of free speech. The court denied the request but amended the order to prohibit only posting messages about petitioner through the use of any medium of communication, including the Internet, a computer, or any electronic medium, pursuant to MCL 750.411s. Respondent appealed in the Court of Appeals. In an unpublished per curiam opinion issued January 19, 2017 (Docket No. 329190), the Court of Appeals, RIORDAN, P.J., and FORT HOOD and SERVITTO, JJ., declined to address the issues raised by respondent, concluding that the issues were moot because the amended PPO had expired on January 28, 2016, while the appeal was pending. Respondent filed an application in the Supreme Court, and in lieu of granting leave to appeal, the Court remanded the case to the Court of Appeals for consideration on the merits, concluding that

although the PPO had expired during the pendency of the appeal, the issues were not moot because if the trial court should never have issued the PPO, respondent would be entitled to have the Law Enforcement Information Network reflect that fact. 501 Mich 312 (2018).

On remand, the Court of Appeals *held*:

1. MCL 600.2950a(1) provides that an individual may petition a circuit court for a PPO to restrain or enjoin an individual from engaging in conduct that is prohibited under MCL 750.411h, MCL 750.411i, or MCL 750.411s. To warrant a PPO under MCL 600.2950a, the individual must allege facts in the petition that constitute stalking as defined in MCL 750.411h or MCL 750.411i, or conduct that is prohibited under MCL 750.411s. In that regard, MCL 750.411s prohibits a person from posting a message through the use of any medium of communication, including the Internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if (1) the person knows or has reason to know that posting the message could cause two or more separate noncontinuous acts of unconsented contact with the victim; (2) posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested; (3) conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested; and (4) conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411s(6) provides, however, that the statute does not prohibit constitutionally protected speech or activity.

2. The First Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that Congress shall make no law abridging the freedom of speech. The First Amendment protects speech over the Internet to the same extent as speech over other media, but the right to speak freely is not absolute. In particular, the First Amendment does not protect defamatory words, fighting words, words that incite or produce imminent lawless action, or true threats; harassing and obnoxious words are not sufficient evidence to support the issuance of a PPO. Defamatory speech—communication that tends to harm the reputation of a person so as to lower him or her in the estimation of the community or deter others from associating or dealing with him or her—involves statements of fact that are provable as false. Whether a state-

ment is actually capable of defamatory meaning is a preliminary question of law for the courts to decide, but whether the statements were actually false and defamatory is a question of fact for the fact-finder.

3. In this case, respondent's Facebook posts and messages were not fighting words or true threats and did not incite or produce imminent lawless action; the harassing and obnoxious messages were not sufficient evidence to support the PPO. With regard to the alleged defamatory words, which would not be constitutionally protected, the trial court failed to assess whether respondent's statements were true or false and did not accept evidence on the issue. For that reason, there was no evidence that respondent defamed petitioner, and the evidence, as a result, did not support a finding that respondent violated MCL 750.411s. Because there were no constitutionally permissible grounds on which to grant the PPO, the order was an unconstitutional prior restraint on respondent's First Amendment right of free speech, and the trial court abused its discretion by issuing the PPO.

Order reversed, PPO vacated, and case remanded for further proceedings.

TM *in propria persona*.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for MZ.

Amici Curiae:

The Smith Appellate Law Firm (by *Michael F. Smith*) and the UCLA School of Law Scott & Cyan Banister First Amendment Clinic (by *Eugene Volokh*) for the Pennsylvania Center for the First Amendment and Aaron H. Caplan.

ON REMAND

Before: RIORDAN, P.J., and FORT HOOD and SERVITTO, JJ.

RIORDAN, P.J. This case returns to us on remand from our Supreme Court. When we originally heard this

case, we dismissed the appeal for mootness. *TM v MZ*,[1] unpublished per curiam opinion of the Court of Appeals, issued January 19, 2017 (Docket No. 329190). The Supreme Court reversed, reasoning that "the mere fact that the instant [personal protection order (PPO)] expired during the pendency of this appeal does not render this appeal moot," and remanded the case to us "for consideration on the merits." *TM v MZ*, 501 Mich 312, 320; 916 NW2d 473 (2018). Because the amended PPO was issued on the basis of respondent's constitutionally protected speech and amounted to an unconstitutional prior restraint on his speech, we reverse the trial court.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Petitioner, TM, and respondent, MZ, are neighbors in Cottrellville Township, Michigan. Respondent is a former trustee of Cottrellville Township and petitioner also has had some involvement in local politics, presently as a member of the township's Parks and Recreation Committee. She also has participated in successful recalls of respondent and the supervisor of Cottrellville Township.

Petitioner and respondent have an acrimonious past. Notably, respondent's mother (with whom respondent lived) obtained a PPO against petitioner's husband after he allegedly assaulted her. The impetus for this case was the highly inflammatory and negative series of comments respondent posted online about petitioner and her family. Respondent had posted negative comments about petitioner on Facebook and

[1] Although this case was initially captioned using the parties' names, on remand we have chosen to use the parties' initials in conformity with the Supreme Court's case caption. See *TM v MZ*, 501 Mich 312, 314 n 1; 916 NW2d 473 (2018).

through private messaging applications as far back as 2014, but when the nature of these postings, in petitioner's words, "escalated," she petitioned the trial court on July 27, 2015, for a PPO. In an attachment to the petition, petitioner identified eight dates on which respondent allegedly made derogatory comments about her and her family by way of posts on his own Facebook page, on public Facebook pages, or in private messages to undisclosed recipients. Specifically, the attachment stated:

> Below are some of the instances where Respondent used the internet or a computer or other electronic medium to post both public and private messages for the purpose of terrorizing, frightening, intimidating, threatening, or harassing me.
>
> **July 6, 2015**
>
> Respondent made several comments on a post in the St. Clair County, Michigan page on Facebook, including but not limited to[:] calling me a criminal, accusing me of hiding criminals, having illegal trailers on my property, posting pictures of my yard, [stating] that I meet the requirements of "hurting someone" and that I'm a criminal.
>
> **July 6, 2015**
>
> Respondent sent a private Facebook message to multiple people, with regards to the above mentioned comments made on the St. Clair County, Michigan page, saying that I am criminal, I hide criminals, and saying things about the death of my son, which were not only derogatory and disgusting, but were complete lies, and how it was because of my parenting. These comments were in addition to other things.
>
> **May 4, 2015**
>
> Respondent posted on his Facebook page a picture of a car and a letter with a heading of "Attempted abduction in St. Clair Count [sic], Please share this Info!" Respondent

then commented on the post that if there were any questions about the vehicle to join the St. Clair County, Michigan Facebook group.

Respondent also commented on this post that the driver of the vehicle "was involved in a form of attempted abduction of a child" and further down respondent commented "I actually saw a similar vehicle at [TM's address], where it was there only a couple of minutes." This is my address.

Respondent also made a comment on the post about the car on the St. Clair County, Michigan Facebook page wherein he stated "a vehicle just like that was at [petitioner's address] today . . . It watched my home, and then pulled into [petitioners's address] – an address notorious for everything from crime to severe ordinance violations that never go away. It was only there for a few minutes."

April 22, 2015

Respondent made a comment on a post about a stolen bbq to "Go look at [petitioner's address] . . . It is a virtual junk yard of items picked up from the garbage of other[s]".

September 7, 2014

Respondent commented on a post in the St. Clair County, Michigan Facebook page about motorcycles stolen out of Auburn Hills, ". . . my neighbor is at [petitioner's address]. . . . I saw them burning parts and burying them illegally in the ground before. I will be on the lookout for you."

August 10, 2014

Respondent wrote a post on the Facebook Cottrellville Township, Michigan page that included stating we had a "junkyard" and "two illegal commercial trailers".

Respondent then made a comment on his post stating ". . . Bob confirmed there is [sic] severe blight and health violations at [petitioner's address] . . ."

Respondent later puts a comment on his post with a Court Case [identification] number to look me up in the court docket.

> Respondent later comments on his post that I was taken to court and at one time had 12 vehicles in my front yard.
>
> **June 2, 2014**
>
> Respondent commented on a post on the St. Clair County, Michigan Facebook page saying that my yard is used as an "illegal junkyard" and posts the link to a video.
>
> **July 24, 2014**
>
> Respondent sent a message to a private citizen making derogatory comments including that "that family is into drugs".

Further, in a Facebook message to an undisclosed recipient on July 6, 2015, respondent shared his comments and opinions on petitioner's parenting abilities, specifically accusing petitioner of allowing her children to partake of illegal drugs, and also discussed the alleged circumstances of her son's death.

On July 28, 2015, the trial court granted petitioner's petition and entered a PPO against respondent. The PPO prohibited respondent from "stalking [petitioner] as defined under MCL 750.411h and MCL 750.411i," and prohibited him from "posting a message [about petitioner] through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411s." On August 3, 2015, respondent moved to terminate the PPO, arguing that petitioner merely was annoyed with his comments and that because there were no allegations of actual, threatened, or attempted violence, her proper remedy was a lawsuit for defamation. At the August 20, 2015 hearing on respondent's motion, the trial court placed both parties under oath. Petitioner stated that, other than being his neighbor, she had no relationship with respondent, and she noted that in the online postings respondent said he was using binocu-

lars to see what was going on in her yard, as well as taking pictures of her and her property, which made her fearful "as to why he is doing this." Petitioner stated that she found respondent's conduct harassing and that she just wanted him to leave her and her family alone. Noting that respondent's comments were personal attacks against her and her family, petitioner stated that respondent's actions put her "in fear of what [respondent] is going to do next" because of the escalation of the nature of the postings. Petitioner noted that respondent owned a firearm, and that she was in fear for her children and her grandchild.

Respondent's counsel argued that respondent's conduct consisted only of speech, "not actions, not threats, not anything." Respondent's counsel reiterated that petitioner's remedy was a defamation claim, not a PPO, and that the court-imposed prohibitions related to stalking were inappropriate. According to respondent's counsel, the PPO was a restraint on respondent's speech that impermissibly infringed his First Amendment rights. While respondent's counsel characterized petitioner as actively involved in local politics, petitioner testified that she did not file the petition to recall respondent as a township trustee but that she did participate in circulating the recall petition. After hearing oral argument, the trial court modified the PPO so that respondent only was prohibited from posting messages "pursuant to MCL 750.411(s)." The trial court subsequently entered an amended order modifying the PPO. The amended PPO provides that respondent is prohibited from "posting a message through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411s," and that the order remained in effect until January 28, 2016. There

is no indication that the trial court renewed this amended PPO, and it expired while the appeal in this Court was pending.

We do not disagree with petitioner or the trial court that respondent's statements often were inappropriate, at times crude, and even sometimes, with respect to the death of petitioner's son, offensive. Inappropriate, crude, and offensive language, however, is not necessarily excepted from constitutional protection. For that reason, we cannot adopt the trial court's preference to treat a PPO, which in this case is a prior restraint on respondent's speech, as a means "to help supplement the rules that we all live in society by." The First Amendment of the United States Constitution demands that we not treat such speech-based injunctions so lightly.

II. CONSTITUTIONALLY PROTECTED SPEECH

Respondent argues that the trial court abused its discretion by issuing the PPO solely on the basis of speech that was entitled to constitutional protection. We agree.

A. STANDARD OF REVIEW

"We review for an abuse of discretion a trial court's determination whether to issue a PPO because it is an injunctive order." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). " '[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes.' " *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018), quoting *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007) (alteration in *Sanders*). "A trial court . . . necessarily

abuses its discretion when it makes an error of law." *Kostadinovski v Harrington*, 321 Mich App 736, 743; 909 NW2d 907 (2017) (quotation marks and citation omitted). Constitutional issues, as questions of law, are reviewed de novo. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). Similarly, questions of statutory interpretation also are reviewed de novo. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

B. APPLICABLE LAW

In this case, petitioner sought a PPO pursuant to MCL 600.2950a(1), which allows for "an independent action to obtain . . . a [PPO] to restrain or enjoin an individual from engaging in conduct that is prohibited under . . . MCL 750.411h, 750.441i, and 750.411s." In order to warrant a PPO pursuant to MCL 600.2950a(1), the petition must "allege[] facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code . . . ." "[T]he petitioner [has] the burden of persuasion in a hearing held on a motion to terminate or modify an ex parte PPO." *Pickering v Pickering*, 253 Mich App 694, 699; 659 NW2d 649 (2002). Accordingly, petitioner had to present sufficient evidence of conduct prohibited by MCL 750.411s to "justify continuation of the PPO." *Pickering*, 253 Mich App at 699 (quotation marks omitted); MCL 600.2950a(1).

Conduct prohibited by MCL 750.411s includes posting "a message through the use of any medium of communication . . . without the victim's consent, if . . . [t]he person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim,"

MCL 750.411s(1)(a), and by posting the message, the person "intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested," MCL 750.411s(1)(b). The statute also requires proof that conduct arising from posting the message would cause a reasonable person, MCL 750.411s(1)(c), and did cause the victim, MCL 750.411s(1)(d), to "suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested." However, MCL 750.411s "does not prohibit constitutionally protected speech or activity." MCL 750.411s(6). Therefore, in order to warrant a PPO pursuant to MCL 600.2950a(1), the trial court had to find that respondent's postings—his speech—were not constitutionally protected. MCL 750.411s(6).

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.' " *Virginia v Black*, 538 US 343, 358; 123 S Ct 1536; 155 L Ed 2d 535 (2003), quoting US Const, Am I. "The United States Supreme Court has held that the federal constitution protects speech over the Internet to the same extent as speech over other media." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 256; 833 NW2d 331 (2013), citing *Reno v American Civil Liberties Union*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997). However, the "right to speak freely is not absolute." *Cooley*, 300 Mich App at 256, citing *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942). For example, "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech," and a state may therefore enact laws punishing them. *Beauharnais v Illinois*, 343 US 250, 266; 72 S Ct 725; 96 L Ed 919 (1952).

Prohibitions relating to content, however, are few, because of the First Amendment's "bedrock principle" that an idea cannot be prohibited "simply because society finds the idea itself offensive or disagreeable." *Texas v Johnson*, 491 US 397, 414; 109 S Ct 2533; 105 L Ed 2d 342 (1989). "The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed." *R A V v City of Saint Paul, Minnesota*, 505 US 377, 386; 112 S Ct 2538; 120 L Ed 2d 305 (1992). "The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Black*, 538 US at 358-359 (quotation marks and citation omitted). Thus, the First Amendment does not protect obscenity or defamation, within certain limits. *R A V*, 505 US at 383. "[A] State may punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace," including "fighting words," "inciting or producing imminent lawless action," and "true threat[s]." *Black*, 538 US at 359 (quotation marks and citation omitted).

C. ANALYSIS

The trial court abused its discretion by refusing to terminate the PPO. Respondent's Facebook posts and messages, quite clearly, were not "fighting words," did not "incit[e] or produc[e] imminent lawless action," and were not "true threat[s]." *Id*. Fighting words include " 'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction . . . .' " *Id*., quoting *Cohen v California*,

403 US 15, 20; 91 S Ct 1780; 29 L Ed 2d 284 (1971). There is nothing in the record to support that when respondent made any of the foregoing statements, he did so in a situation in which it was "inherently likely to provoke violent reaction," considering he made the statements on the Internet, in a public forum, far removed from any potential violence. See *Black*, 538 US at 359. A "true threat," meanwhile, "encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. While respondent's posts were undoubtedly in poor taste and offensive, they did not reach the level of intending the commission of an unlawful act of violence. See *id*.

Further, respondent's statements did not "incit[e] or produc[e] imminent lawless action . . . ." *Id*. The closest that respondent's speech came to that standard was his assertion that someone should "[g]o look at" petitioner's address in search of a stolen grill. That statement was not likely to incite illegal activities, because "looking at" an individual's house, yard, or property is not illegal. Had respondent urged the individual to break into petitioner's house or to otherwise trespass on her property, there would be a legitimate question regarding whether his speech was protected. As the record stands, there was no such suggestion by respondent. See *id*.

The trial court noted that respondent's statements regarding petitioner's alleged illegal activities, the most serious of which concerned involvement in a kidnapping, likely would have produced unconsented contact from the community. Regardless of the veracity of that assertion by the trial court, the United States Supreme Court has determined in similar cases that

the respondent's speech still was protected. See *Org for a Better Austin v Keefe*, 402 US 415, 417-419; 91 S Ct 1575; 29 L Ed 2d 1 (1971) (holding that First Amendment protection applied to the distribution of leaflets even when those leaflets accused an individual of racism, provided personal information about the person including his telephone number, and urged the recipients of the leaflets to contact him); see also *NAACP v Claiborne Hardware Co*, 458 US 886, 909-910; 102 S Ct 3409; 73 L Ed 2d 1215 (1982) (holding that "[s]peech does not lose its protected character," even when the speech involved publicly listing the names of individuals who did not participate in a boycott, which undoubtedly was meant to lead to unconsented contact with those individuals, so as to "persuade [them] to join the boycott through social pressure and the 'threat' of social ostracism"). At its very base, the exception to the First Amendment for incitement of imminent lawless action requires that the incitement be for actually illegal actions, not just inconvenient or aggravating ones. See *id*. at 908-910. "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v State College Area Sch Dist*, 240 F3d 200, 204 (CA 3, 2001). In this case, the record does not support that respondent's statements were intended to incite imminent lawless action. See *Keefe*, 402 US at 417-420.

Considering that these exceptions to constitutionally protected speech do not apply in the instant case, the only remaining category of content-based prohibitions that might be applicable is defamation. Defamatory speech is not protected by the United States Constitution. See *Beauharnais*, 343 US at 266. "A defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing

with him." *Lawrence v Burdi*, 314 Mich App 203, 214; 886 NW2d 748 (2016) (quotation marks and citation omitted). A defamatory statement, by its very definition, is one that is false. *Edwards v Detroit News, Inc*, 322 Mich App 1, 12; 910 NW2d 394 (2017). "To be considered defamatory, statements must assert facts that are 'provable as false.' " *Ghanam v Does*, 303 Mich App 522, 545; 845 NW2d 128 (2014), quoting *Milkovich v Lorain Journal Co*, 497 US 1, 19; 110 S Ct 2695; 111 L Ed 2d 1 (1990). Generally, "[a]ccusations of criminal activity are considered 'defamation per se' under the law and so do not require proof of damage to the plaintiff's reputation." *Ghanam*, 303 Mich App at 545.

As an initial step, a trial court must determine whether a respondent's statements were "provable as false" and therefore capable of defamatory meaning, *Milkovich*, 497 US at 19, because "[w]hether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide," *Sarkar v Doe*, 318 Mich App 156, 179; 897 NW2d 207 (2016) (quotation marks and citation omitted).[2] However, while determining whether a statement is capable of defamatory meaning is a question of law for courts to decide, whether the statements actually were false and defamatory is not. See *id*.; see also *Masson v New Yorker Magazine, Inc*, 501 US 496, 521; 111 S Ct 2419; 115 L Ed 2d 447 (1991) (holding that falsity is a question of fact

[2] Although ultimately irrelevant, considering that respondent also specifically accused petitioner and her family of committing a crime, which was provable as false, we question whether respondent's statements regarding petitioner's parenting were capable of defamatory meaning. See *Ireland v Edwards*, 230 Mich App 607, 620; 584 NW2d 632 (1998) (stating that the questions "whether someone is a fit mother, or whether someone is abysmally ignorant, can only be answered subjectively"). Because defendant's statements regarding plaintiff's fitness as a mother are statements of opinion, they are not actionable.

for a fact-finder to determine when differing evidence is presented).

Here, the trial court never made a determination whether the accusations made by respondent were false. When respondent stated that he could offer proof that his statements were true, the trial court refused to consider the evidence or to hold an evidentiary hearing. The trial court reasoned that an inquiry regarding falsity was unnecessary because, in the court's own words, "I don't believe because of [petitioner's] status that truth is an absolute defense to this, and so I'm going to deny your request for an evidentiary hearing because I don't think there's any need to do that." The trial court also stated, when discussing respondent's accusation that petitioner had assisted in a kidnapping, "whether or not that actually happened, I don't think that's the standard."

The trial court was incorrect. "Truth is an absolute defense to a defamation claim." *Wilson v Sparrow Health Sys*, 290 Mich App 149, 155; 799 NW2d 224 (2010). The rule applies even when the person who allegedly has been defamed is a private citizen and the alleged defamer is not a member of the media. *Hawkins v Mercy Health Servs, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998). Accordingly, in order for respondent's statements to have been considered defamatory they must have been false, but the trial court, determining that such an inquiry was unnecessary, refused to accept evidence on the issue or to even make the determination. Consequently, we have not been provided with a record that would allow for us to make a determination whether respondent's statements were defamatory.[3] See *id*.

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[3] Because the trial court failed to make the inquiry into falsity, the PPO must be vacated. Therefore, it is unnecessary to consider

In sum, the trial court entered the PPO pursuant to MCL 600.2950a, finding a violation of MCL 750.411s. The trial court determined that respondent had violated MCL 750.411s by posting certain messages on Facebook. Pursuant to MCL 750.411s(6), however, the statute "does not prohibit constitutionally protected speech or activity." Speech over the Internet is entitled to First Amendment protection in the same manner as traditional speech. *Cooley*, 300 Mich App at 256, citing *Reno*, 521 US at 870. Constitutionally protected speech includes all speech except that falling into certain categories, including defamation, fighting words, words inciting imminent lawless action, and true threats. *Black*, 538 US at 359; *Beauharnais*, 343 US at 266. Respondent's speech did not amount to fighting words, words inciting imminent lawless action, or true threats. *Black*, 538 US at 359; *Beauharnais*, 343 US at 256, 266. It was not enough to show that respondent's words amounted to harassment or obnoxiousness. *Saxe*, 240 F3d at 204. Therefore, the only possible category remaining to the trial court that would not be considered constitutionally protected speech was defamation. See *Beauharnais*, 343 US at 256, 266. The trial court's failure to assess whether respondent's statements were true or false, or to accept evidence on the

whether, pursuant to Const 1963, art 1, § 19, the trial court is permitted to make such a determination when deciding whether to grant a PPO. That constitutional provision provides that "[i]n all prosecutions for libels the truth may be given in evidence to the jury . . . ." *Id*. This Court and the Michigan Supreme Court previously have indicated that Const 1963, art 1, § 19, could apply in civil cases. See *Howe v Detroit Free Press, Inc*, 440 Mich 203, 225; 487 NW2d 374 (1992) (holding that the defendant's "constitutional right is implicated" in the civil case for libel); see also *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 56; 495 NW2d 392 (1992) (citing Const 1963, art 1, § 9, for the "basic principle of libel law that truth is a defense to an action for defamation"). Whether the constitutional provision at issue would apply in a PPO case is a determination for another day.

issue, renders review of that issue impossible. For that reason, respondent cannot be said to have defamed petitioner, nor is there anything in the record to support a finding that MCL 750.411s was violated. MCL 750.411s(6). Absent a violation of MCL 750.411s, there were no grounds on which to enter the PPO. MCL 600.2950a. Consequently, the trial court's decision to the contrary was an error of law and, therefore, an abuse of discretion. See *Kostadinovski*, 321 Mich App at 743.

Because we conclude "that the trial court should never have issued the PPO, respondent [is] entitled to have LEIN[4] reflect that fact." *TM*, 501 Mich at 319.

III. PRIOR RESTRAINT ON SPEECH

Respondent also argues that the trial court abused its discretion by issuing the PPO because it was an unconstitutional prior restraint on his speech. We agree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

Constitutional issues, as questions of law, are reviewed de novo. *Winkler*, 500 Mich at 333. "We review for an abuse of discretion a trial court's determination whether to issue a PPO because it is an injunctive order." *Hayford*, 279 Mich App at 325. "The term 'prior restraint' is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur. Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v United States*, 509 US 544,

[4] LEIN stands for the Law Enforcement Information Network.

550; 113 S Ct 2766; 125 L Ed 2d 441 (1993) (quotation marks and citation omitted). Such restrictions are distinguishable from punishment arising from past speech that has been adjudicated as criminal. *Id*. at 550-551. Because injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," they "require a somewhat more stringent application of general First Amendment principles." *Madsen v Women's Health Ctr, Inc*, 512 US 753, 764-765; 114 S Ct 2516; 129 L Ed 2d 593 (1994). Any prior restraint of expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc v Sullivan*, 372 US 58, 70; 83 S Ct 631; 9 L Ed 2d 584 (1963).

B. ANALYSIS

The PPO in this case was an unconstitutional prior restraint on respondent's freedom of speech. Whether and under what circumstances a court in Michigan is permitted to enjoin defamation has not been considered by this Court in a published decision since 1966, in *McFadden v Detroit Bar Ass'n*, 4 Mich App 554; 145 NW2d 285 (1966).[5] In that case, a panel of this Court held that "it is a familiar and well-settled rule of American jurisprudence that equity will not enjoin a defamation, absent a showing of economic injury . . . ." *Id*. at 558. The *McFadden* Court stated that the primary reason for refusing to do so was "an abhorrence of previous restraints on freedom of speech," but acknowledged other reasons, including that there is "an adequate remedy at law, *i.e.*, an action for damages, and that the defendant in a defamation action

[5] This case is not binding because it was decided before November 1, 1990. MCR 7.215(J)(1).

has the right to a jury trial which would be precluded by granting of an injunction." *Id*.

Contrary to *McFadden*, there is a modern trend toward allowing injunctions of defamatory speech. That modern trend, though, first requires a determination by a fact-finder that the statements were definitively false and then specifically limits any injunction to the adjudicated speech.[6] As discussed, the trial court failed to make such a determination in this case. Therefore, regardless of whether the modern trend or the rule announced in *McFadden*, 4 Mich App at 558, is adopted, the issuance of the PPO here, because of the trial court's failure to determine that the speech actually was false, fails to overcome the "heavy presumption against its constitutional validity." *Bantam Books*, 372 US at 70.

In sum, because the trial court never determined what statements by respondent, if any, actually were false, there simply were no constitutionally permissible grounds, even considering the modern trend, on which to issue the PPO. See *id*.

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[6] Numerous courts, both federal and state, have held that a trial court may enjoin a defendant from making defamatory speech after there has been a determination that the speech was, in fact, false. See *Hill v Petrotech Resources Corp*, 325 SW3d 302, 308-309 (Ky, 2010); *San Antonio Community Hosp v Southern California Dist Council of Carpenters*, 125 F3d 1230, 1239 (CA 9, 1997); *Lothschuetz v Carpenter*, 898 F2d 1200, 1208-1209 (CA 6, 1990) (Wellford, J., concurring in part and dissenting in part); *id*. at 1209 (Hull, J., concurring in part and dissenting in part); *Balboa Island Village Inn, Inc v Lemen*, 40 Cal 4th 1141, 1155-1156; 156 P3d 339 (2007); *Retail Credit Co v Russell*, 234 Ga 765, 777-779; 218 SE2d 54 (1975); *Advanced Training Sys, Inc v Caswell Equip Co, Inc*, 352 NW2d 1, 11 (Minn, 1984); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc v Sullivan*, 251 Neb 722, 732; 559 NW2d 740 (1997); *Organovo Holdings, Inc v Dimitrov*, 162 A3d 102, 123-126 (Del Ch, 2017). Cf. *Kinney v Barnes*, 443 SW3d 87, 94-99 (Tex, 2014).

IV. CONCLUSION

We reverse the trial court order, vacate the PPO, and remand with instruction that the "PPO should be updated in LEIN as rescinded . . . ." *TM*, 501 Mich at 320. We do not retain jurisdiction.

FORT HOOD and SERVITTO, JJ., concurred with RIORDAN, P.J.

CITY OF DETROIT v CITY OF DETROIT BOARD OF ZONING APPEALS

Docket No. 339018. Submitted August 15, 2018, at Detroit. Decided October 23, 2018, at 9:15 a.m.

The city of Detroit brought an action in the Wayne Circuit Court against the city's Board of Zoning Appeals (the BZA) to appeal the BZA's decision that granted a use variance to intervenor International Outdoor Inc. (IO) for the erection of a billboard in an area of the city designated as the Grand Boulevard overlay zone. Detroit Zoning Ordinance, § 61-6-65 bans off-site advertising signs in the Grand Boulevard overlay zone. In 2011, IO purchased a small parcel of vacant property in the overlay zone and submitted an application for a permit to erect a billboard on the property. The city's planning department denied the application, citing Detroit Zoning Ordinance, § 61-6-65. IO appealed to the BZA, seeking a hardship variance and claiming that the city's ordinance scheme rendered the property unfit for any reasonable or economically feasible use because of its size and shape. The BZA voted to grant the variance, and the city appealed that decision in the circuit court. The court, Lita M. Popke, J., affirmed the BZA's decision, explaining that while IO bought the property with knowledge of the ban on off-site advertising signs, there was no evidence that IO took any action that physically altered the property to create the hardship at issue. The city appealed in the Court of Appeals, claiming that the BZA did not have the authority to grant the variance in the overlay zone and that even if it did, IO's act of purchasing the property created the hardship at issue.

The Court of Appeals *held*:

1. The decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion. MCL 125.3604 defines a board's authority to grant a use variance, providing, in pertinent part, that if there are practical difficulties for nonuse variances or unnecessary hardship for use variances in the way of carrying out the strict letter of the zoning ordinance, the zoning board of

appeals may grant a variance so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. Detroit Zoning Ordinance, § 61-6-65 prohibits off-site advertising signs in the Grand Boulevard overlay zone. However, Detroit Zoning Ordinance, § 61-4-127(3) provides, in pertinent part, that the BZA may adopt any legally available incentive or measure that is reasonably necessary to offset any denial of reasonable economic use; that when the BZA finds that the denial of the application would create a substantial economic hardship, the BZA may consider additional relief to provide an appropriate increase in market value or other benefit or return to the petitioner sufficient to offset the denial of all reasonable economic use; and that the BZA may allow the establishment of a prohibited use, provided that the petitioner demonstrates that none of the permitted or conditional uses in the zoning district is economically feasible. In this case, nothing in Detroit's ordinances prohibited the BZA from granting a use variance in the Grand Boulevard overlay zone. The BZA went through the factors as required under Detroit Zoning Ordinance, § 61-4-81, found no other permitted or conditional use, and concluded that the overlay would deprive the property of all reasonable economic use. The city council, as Detroit's legislative body, expressly authorized the BZA to grant any request based on hardship in order to effectuate the use of land in a manner that promotes and protects the public health, safety, and general welfare. The BZA recognized that this property had no other reasonable economic use and that denying the variance would perpetuate a hardship caused by Detroit's ordinances. Moreover, preventing any development of property would not promote the general welfare and would raise constitutional concerns under the Fifth Amendment. Accordingly, the BZA was authorized to grant a hardship variance within the overlay zone.

2. To prove hardship, the BZA had to find on the basis of substantial evidence the following: (1) the property could not reasonably be used in a manner consistent with existing zoning, (2) the landowner's plight was due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance would not alter the essential character of a locality, and (4) the hardship was not the result of the applicant's own actions. The parties did not dispute the BZA's findings as to the first three elements of the hardship test; the only contention on appeal was whether the hardship was the result of the applicant's own actions. A zoning board must deny a variance on the basis of the self-created-hardship rule when a landowner or predecessor in

title partitions, subdivides, or somehow physically alters the land after the enactment of the applicable zoning ordinance so as to render it unfit for the uses for which it is zoned. In this case, there was no evidence in the record that IO physically altered the property in such a way to create the hardship at issue; IO simply purchased the property at a time when there was no permitted reasonable use and took a business risk that the BZA would grant a variance to erect the billboard in the overlay zone. The self-created hardship rule could not be extended to all instances in which a landowner simply purchases the property with knowledge of an ordinance's applicable restriction. Accordingly, the BZA did not abuse its discretion when it granted the use variance on the basis of economic hardship.

Affirmed.

RONAYNE KRAUSE, J., dissenting, would have held that the BZA did not have the authority to grant the use variance in this case and that IO was not entitled to the variance. Under Detroit Zoning Ordinance, § 61-4-81, variances must comport with all 10 enumerated criteria for approval, and any variance must not functionally effectuate a rezoning. Accordingly, the BZA did not have unfettered discretion to grant any variance merely because doing so would ameliorate a hardship. Permitting an off-site advertising sign in the Grand Boulevard overlay zone would not merely be a grant of leeway for a technical violation but would outright permit the establishment of a prohibited use within the district that goes against the spirit, purpose, and intent of the zoning ordinance. Additionally, Detroit Zoning Ordinance, § 61-6-65 expressly authorizes the BZA to approve an enlargement or expansion of lawfully existing signage while simultaneously setting forth an absolute prohibition against new signage; therefore, applying the doctrine of *expressio unius est exclusio alterius*, § 61-6-65 stripped the BZA of any power to grant use variances that would permit new signage within the Grand Boulevard overlay zone. Moreover, under MCL 125.3604(7), the power given to municipalities to grant use variances based on unnecessary hardships is expressly restricted, not absolute. Neither Detroit Zoning Ordinance, § 61-4-81 nor MCL 125.3604(7) entitles a landowner to a use variance only on the basis of establishing an unnecessary hardship; therefore, the BZA was not empowered to grant the use variance in this case because of the additional requirements imposed by both the ordinance and the statute. Finally, IO, a highly sophisticated and experienced corporation, created its own hardship by purchasing property that it knew

could not be used for its intended purpose. Accordingly, IO was not entitled to receive its requested use variance.

ZONING — USE VARIANCES — SELF-CREATED-HARDSHIP RULE.

A zoning board must deny a variance on the basis of the self-created-hardship rule when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land after the enactment of the applicable zoning ordinance so as to render it unfit for the uses for which it is zoned; the self-created-hardship rule does not extend to all instances in which a landowner simply purchases the property with knowledge of an ordinance's applicable restriction.

City of Detroit Law Department (by *Charles N. Raimi*, Deputy Corporation Counsel, and *Sheri L. Whyte*, Senior Assistant Corporation Counsel) for the city of Detroit.

Lewis & Munday, PC (by *Reginald G. Dozier* and *Samuel E. McCargo*) for the city of Detroit Board of Zoning Appeals.

Bodman PLC (by *J. Adam Behrendt*) for International Outdoor Inc.

Before: CAMERON, P.J., and RONAYNE KRAUSE and TUKEL, JJ.

CAMERON, P.J. The city of Detroit (the City) appeals the circuit court order affirming the decision of the City's Board of Zoning Appeals (the BZA) to grant a use variance to International Outdoor Inc. (IO) for the erection of a billboard. On appeal, the City argues that the BZA did not have the authority to grant a use variance in an area of Detroit designated as the Grand Boulevard overlay zone, which bans off-site advertising signs. Even if the BZA did have the authority, the City argues that IO could not prove that the ordinance imposed an unnecessary hardship because IO "pur-

chased the hardship," i.e., it purchased the property with knowledge that the ordinance banned off-site advertising signs. We conclude that the BZA had the authority to grant a use variance in the overlay zone and that the BZA did not err when it granted IO's request for a use variance based on unnecessary hardship. Because neither IO nor its predecessor in title created the hardship by partitioning, subdividing, or otherwise physically altering the land after the enactment of the ordinance, the BZA could grant the use variance. Therefore, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1999, the City amended its zoning ordinance to ban off-site advertising signs in a portion of the City referred to as the Grand Boulevard overlay zone. See Detroit Zoning Ordinance, § 61-6-65.[1] In 2011, IO purchased a small parcel of vacant property in Detroit that was located within the overlay zone and was zoned as a B4 general business district. The property measured 30 feet wide and 184 feet long with an area of 5,520 square feet. In 2015, IO submitted an application for a permit to erect a billboard on the property. The City's planning department denied the application, referring to the advertising restrictions in the Grand Boulevard overlay zone.

IO appealed to the BZA, seeking a hardship variance.[2] IO claimed that the City's ordinance scheme rendered the property unfit for any reasonable or

[1] All citations of the Detroit Zoning Ordinance are to the versions of the relevant sections as codified on May 28, 2005, as shown in the August 11, 2016 version of the ordinance, available at <https://perma.cc/BA45-6K6A>.

[2] IO also requested a dimensional variance for the height of the proposed billboard. Eventually, IO agreed to lower the height of the

economically feasible use because of its size and shape. IO's assertion was not disputed, but at the BZA hearing, several board members expressed their concern that IO, as a billboard company, purchased the property with the intent of one day erecting a billboard, though it knew the property was located within the overlay zone. IO's attorney explained that "there is no feasible or economic or functional use of this property because of the size" and that no one "will . . . be able to put any use on this; it would not meet parking, would not meet open space, landscaping, any type of requirement this site could not meet." Instead, IO's attorney asserted, the only possible uses for the property would be to either erect a billboard or a cell tower—neither of which was currently allowed on the property. One board member also questioned whether the BZA had the authority to grant a variance in an overlay zone—which might have higher authority over other ordinances. In response, IO's attorney explained that "[i]t's not higher; it is an ordinance, period. It is not a statute . . . . If you applied that standard, then there would be no such thing as a dimensional or a hardship variance, you would always say, that's what the code says, . . . we're inflexible to it." Another board member interjected and asserted that the BZA's purpose is to consider when to "override the overlay districts and the signs." Before turning to a vote, a third board member made one final observation:

> Just, before we get a motion on the floor, the observation that I want to make here is that if we were to approve this as a hardship, virtually any property developer, um, in—virtually any property developer in the city could purchase a subsection of a piece of land in an overlay district and claim that they have a hardship because there

billboard so that it complied with Detroit's height requirements. The City raises no claim related to the site plan of the proposed billboard.

> is no other use that they can make of this land other than whatever it is that they bought it for; in this case, a billboard. . . . I think that what this does is it creates a precedent that virtually obsolesces the concept of an overlay.

Ultimately, the BZA voted to grant the variance, and the City appealed that decision in the circuit court.[3]

The circuit court affirmed the BZA's decision. In its holding, the court explained that while IO bought the property with knowledge of the ban on off-site advertising signs, there was no evidence that IO took any action that physically altered the property to create the hardship now at issue. According to the court, "[c]urrent Michigan law does not support [the City's] argument that the Self-Created Hardship Rule bars [IO's] variance request and the [c]ourt declines to expand Michigan law at this time." The City now appeals the circuit court's decision, claiming that the BZA did not have the authority to grant the variance in an overlay zone and that even if it did, IO's act of purchasing the property created the hardship at issue.

II. STANDARD OF REVIEW

We review de novo the underlying interpretation and application of an ordinance. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008). MCL 125.3606 provides, in pertinent part, the standard used to review the decision of a zoning board of appeals:

> (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the

[3] The City did not include IO in its pleadings on appeal in the circuit court. After the appeal was filed, IO moved to intervene, and the court granted the motion.

> county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. [MCL 125.3606(1).]

In other words, "[t]he decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion." *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002); see also MCL 125.3606(1).

III. THE BZA'S AUTHORITY TO GRANT THE USE VARIANCE

Initially, the question turns on whether the BZA had authority to grant a use variance in the overlay zone. After review of the prevalent statutes and caselaw, we conclude that the BZA had the authority to grant IO's variance request. MCL 125.3604 defines a board's authority to grant a use variance, providing, in pertinent part:

> (7) If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. . . .

* * *

> (10) The authority granted [to cities and villages under this ordinance] is subject to the zoning ordinance of the local unit of government otherwise being in compliance with subsection (7) and having an ordinance that requires a vote of 2/3 of the members of the zoning board of appeals to approve a use variance.
>
> (11) The authority to grant use variances [to cities and villages under this ordinance] is permissive, and this section does not require a local unit of government to adopt ordinance provisions to allow for the granting of use variances. [MCL 125.3604(7), (10), and (11).]

We have held that "[a] township zoning board of appeals has the authority to vary or modify *any* zoning ordinance to prevent unnecessary hardship if the spirit of the ordinance is observed, the public safety is secured, and substantial justice is done." *Janssen*, 252 Mich App at 201 (emphasis added).

At issue in this case is Detroit's ordinance banning advertising signs within the Grand Boulevard overlay zone:

> **Sec. 61-6-65. Advertising signs within the area bounded by Grand Boulevard.**
>
> It shall be unlawful to construct, erect, paint, fasten, or affix any new advertising sign, whether billboard or painted wall graphic, on any zoning lot abutting or within the area bounded by East Grand Boulevard, the Detroit River, and West Grand Boulevard. This prohibition in no way limits the right to periodically alter the advertising display on billboards approved for "changeable copy" or to repaint the display on duly licensed painted wall graphics. No lawfully existing advertising sign within said area shall be enlarged or expanded, except upon approval of the Board of Zoning Appeals as provided for in Sec. 61-15-16 of this Code. [Detroit Zoning Ordinance, § 61-6-65.][4]

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[4] The Detroit Zoning Ordinance is Chapter 61 of the 1984 Detroit City Code. References in the Detroit Zoning Ordinance to "this Code" are to the 1984 Detroit City Code. Detroit Zoning Ordinance, § 61-1-1.

With this backdrop, we acknowledge that the BZA has broad power under Detroit's ordinances to provide relief for any landowner who proves an economic hardship:

> **Sec. 61-4-127. Additional forms of relief.**
>
> The Board of Zoning Appeals may adopt any legally available incentive or measure that is reasonably necessary to offset any denial of reasonable economic use, and may condition such incentives upon approval of specific development plans. Where the Board of Zoning Appeals finds that the denial of the application would create a substantial economic hardship, the Board may consider additional relief to provide an appropriate increase in market value or other benefit or return to the petitioner sufficient to offset the denial of all reasonable economic use. The types of incentives that the Board of Zoning Appeals may consider include, but are not limited to, the following:
>
> * * *
>
> (3) Allow the establishment of a prohibited use, provided, that the petitioner demonstrate none of the permitted or Conditional Uses in the zoning district is economically feasible. [Detroit Zoning Ordinance, § 61-4-127(3).]

The BZA can provide relief necessary to resolve an economic hardship due to an ordinance, so long as no other permitted or conditional use is economically feasible. Nothing in Detroit's ordinances prohibits the BZA from granting a use variance in the Grand Boulevard overlay zone, and as stated in *Janssen*, 252 Mich App at 201, a board "has the authority to vary or modify *any* zoning ordinance to prevent unnecessary hardship . . . ." (Emphasis added.) The purpose and intent of Detroit's Zoning Ordinance is "to guide and regulate the appropriate use or development of all land in a manner which will promote and protect the public

health, safety, and general welfare." Detroit Zoning Ordinance, § 61-1-4. To bar the BZA outright from granting any variances in the overlay zone may interfere with the purpose and intent of the Detroit Zoning Ordinance. And contrary to the City's assertions, the BZA has not usurped the power of Detroit's City Council. Rather, Detroit's City Council has granted the BZA broad power through the ordinances to approve use variances when there is unnecessary hardship. Therefore, the BZA had the authority to grant a variance to IO for the erection of a billboard, so long as IO could prove an unnecessary hardship.

The dissent concludes that the BZA "did not have the authority to grant the [hardship] variance at issue . . . ." In reaching this conclusion, the dissent acknowledges that Detroit Zoning Ordinance, § 61-4-103 governs hardship variances and gives the BZA discretion to grant or deny a landowner "relief." The dissent argues, however, that the variance granted in this case contravenes the "spirit, purpose, and intent of the zoning ordinance" as set forth in Detroit Zoning Ordinance, § 61-4-81, which establishes 10 criteria for variances and administrative adjustments. Specifically, the dissent claims:

> [P]ermitting an off-site advertising sign would not merely be a grant of leeway for a technical violation. Rather, it would outright "permit the establishment, within a zoning district, of [a] use which is prohibited within the district[.]" See Detroit Zoning Ordinance, § 61-4-81(8). Consequently, the use variance here could not possibly comport with all 10 criteria mandated by § 61-4-81.

We believe that the dissent's focus on § 61-4-81 is misplaced. While this provision establishes the general standard for any variance, Detroit's Zoning Ordinance also establishes specific standards for variances based

on "substantial economic hardship." That is the type of variance at issue here. Section 61-4-127 provides "[a]dditional forms of relief" for hardship-relief petitions, expressly granting the BZA power to "adopt any legally available incentive or measure that is reasonably necessary to offset any denial of reasonable economic use," including "[a]llow[ing] the establishment of a *prohibited use*, provided, that the petitioner demonstrate none of the permitted or Conditional Uses in the zoning district is economically feasible." Detroit Zoning Ordinance, § 61-4-127(3) (emphasis added).

In this case, the BZA did just that. It went through the factors as required under § 61-4-81, found no other permitted or conditional use, and concluded that the overlay would deprive the property of all reasonable economic use. The city council, as Detroit's legislative body, expressly authorized the BZA to grant any request based on hardship in order to effectuate the use of land in a manner that promotes and protects the public health, safety, and general welfare. The BZA recognized that this property has no other reasonable economic use and that denying the variance would perpetuate a hardship caused by Detroit's ordinances. Moreover, preventing *any* development of property does not promote the general welfare and arguably raises constitutional concerns. See Detroit Zoning Ordinance, § 61-4-102 (applicants must have "a protectable interest in property under the Fifth Amendment to the United States Constitution and under the 1963 Michigan Constitution"). To allow legislation, such as the Grand Boulevard overlay, to deprive a property owner of all use of property would certainly raise concerns under the Fifth Amendment, and Detroit's Zoning Ordinance gave the BZA authority to grant a hardship variance in this case.

Lastly, we believe that the dissent's application of the rule of *expressio unius est exclusio alterius* to interpret the Grand Boulevard overlay under § 61-6-65 is unpersuasive. The last sentence under § 61-6-65 addresses "lawfully existing advertising sign[s]" in the overlay zone, i.e., signs that would be considered nonconforming uses, and grants the BZA express power to enlarge or expand such signs pursuant to Detroit Zoning Ordinance, § 61-15-16. Expressly granting the BZA authority to address a nonconforming use in the overlay zone does not, by the dissent's application of *expressio unius*, preclude the BZA's authority to grant hardship-relief petitions. Moreover, the overlay ban cannot be interpreted as the dissent suggests because MCL 125.3604(7) gives the BZA authority to grant use variances based on unnecessary hardships and §§ 61-4-101 and 61-4-127 authorize the BZA to grant a petitioner "any legally available incentive or measure" involving "any regulations," including the allowance of a prohibited use, when considering a hardship-relief petition. This Court should not apply the rule of *expressio unius* in order to override a state statute and the City's properly enacted ordinances. The rule "is a tool to ascertain the intent of the Legislature," and it cannot be employed to contradict or vary a clear expression of legislative intent. *Luttrell v Dep't of Corrections*, 421 Mich 93, 107; 365 NW2d 74 (1984). For these reasons, the BZA was authorized to grant a hardship variance within the overlay zone.

IV. HARDSHIP

The next question turns on whether IO was deprived of all reasonable economic use of the property and, therefore, had proven that the ordinance imposed a

hardship meriting a use variance. We conclude that IO made a sufficient showing of hardship.

To prove hardship, the BZA had to find on the basis of substantial evidence the following: "(1) the property cannot reasonably be used in a manner consistent with existing zoning, (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance will not alter the essential character of a locality, and (4) the hardship is not the result of the applicant's own actions." *Janssen*, 252 Mich App at 201.

The parties do not dispute the BZA's findings as to the first three elements of the hardship test. There was no argument that the small, unusual parcel at issue could be reasonably used in a manner consistent with existing zoning, that the landowner's plight was due to general conditions in the neighborhood reflecting the unreasonableness of the zoning, or that the use variance would alter the essential character of the locality. Instead, the only contention on appeal is whether the hardship was the result of the applicant's own actions. This determination turns on the applicability of the "self-imposed" or "self-created" hardship rule.

The City claims that IO created the hardship it now complains of by purchasing the property with the knowledge that off-site advertising signs were prohibited there. We disagree.

We conclude that a zoning board must deny a variance on the basis of the self-created-hardship rule when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land *after* the enactment of the applicable zoning ordinance, so as to render it unfit for the uses for which it is zoned. Zoning boards have broad authority to grant variances

to further the purpose and intent of the zoning code. Therefore, we decline to extend the self-created-hardship rule to all instances in which a landowner simply purchases the property with knowledge of an ordinance's applicable restriction.

Our analysis begins with *Johnson v Robinson Twp*, 420 Mich 115, 126; 359 NW2d 526 (1984), in which our Supreme Court concluded that the plaintiffs—as the landowners—were properly denied an area variance because "the only practical difficulty or hardship is one that was produced by the plaintiffs' family." In that case, an ordinance prohibited the construction of buildings on lots that were less than 99 feet wide. *Id*. at 117. Notwithstanding the ordinance, the previous landowners (family members of the original landowner) subdivided the property, which resulted in a parcel that was only 60 feet wide. *Id*. That parcel was then transferred to the plaintiff (another family member), who sought a variance to construct a residence on the undersized lot. *Id*. The zoning board of appeals denied the variance, but the circuit court and the Court of Appeals concluded that the zoning board erred when it denied the variance because the landowners had demonstrated a hardship and "the self-created nature of the lot was irrelevant in this case." *Id*. at 118-119, 121 (quotation marks omitted). However, our Supreme Court reversed and reinstated the board's denial of the variance, holding:

> The zoning ordinance preceded the division of this property. Thus the plaintiffs' problems were not caused by the township, but were caused by the division. Since, prior to the split, this land was being properly used in conformance with the zoning ordinance, we can see no sense in which the township can be said to have unconstitutionally deprived the plaintiffs of their property rights. On the

> facts of this case, neither can it be said that the Zoning Board of Appeals abused its discretion. [*Id*. at 126.]

Stated differently, a landowner is not entitled to a hardship variance if the parcel had a reasonable use under the zoning ordinance and the landowner's subsequent act of splitting the property renders the property unfit for the uses for which it is zoned.

After *Johnson*, this Court issued a number of decisions applying the self-created-hardship rule in different contexts. In *Bierman v Taymouth Twp*, 147 Mich App 499, 502; 383 NW2d 235 (1985),[5] we addressed whether the zoning board of appeals properly denied a special-use permit for a junkyard on property zoned for A-1 agricultural. The property at issue had two defining characteristics—a portion that was used for farming and a portion "much less susceptible to development" consisting of a swamp area caused by sand-mining operations by the previous title owner, the plaintiffs' grandfather. *Id*. at 505-506. When addressing the swamp portion of the property, we upheld the board's denial of a zoning change and concluded that this was not "a situation where a zoning ordinance renders the land, in its natural condition, unadaptable to any reasonable use permitted by the ordinance. Rather, the affirmative actions of the previous owners have changed the basic nature of the property from that capable of agricultural adaptation to a swamp which, in its present form, is useless to the plaintiffs." *Id*. at 506. In reaching our conclusion, we acknowledged the case's factual similarities with *Johnson* and reasoned, like in *Johnson*, that if the landowners'

[5] This Court is not bound by its opinions issued before November 1, 1990. MCR 7.215(J)(1). However, earlier Court of Appeals cases may nonetheless be persuasive authority. *DC Mex Holdings LLC v Affordable Land LLC*, 320 Mich App 528, 543 n 5; 907 NW2d 611 (2017).

property "cannot be utilized in its present condition for any of the uses permitted under the ordinance, they have no one to blame but their grandfather." *Bierman*, 147 Mich App at 506-507. In other words, the grandfather—not the zoning ordinance—imposed a self-created hardship on the land that followed the successors in title because he "voluntarily disrupted the natural condition of the land so as to make it useless in its resulting state." *Id*. at 507.

In *Cryderman v City of Birmingham*, 171 Mich App 15, 18-19; 429 NW2d 625 (1988), the plaintiffs purchased Lot 92, where they resided, and two adjacent unplatted lots that they used "as a side yard and lawn for their residence on Lot 92." At the time of purchase, a city ordinance prevented the construction of residential buildings on unplatted lots like the plaintiffs' lots. *Id*. at 19. Eventually, the plaintiffs sought a hardship variance that would permit them to sell their two unplatted lots as building sites. *Id*. Their request for a variance was denied, and the circuit court affirmed the BZA's decision. *Id*. at 19-20. This Court, relying on *Johnson*, concluded that "the only practical difficulty or hardship was not caused by the zoning ordinance, but by [the] plaintiffs' decision to sell the property separately from Lot 92." *Id*. at 22. Thus, the plaintiffs could not properly claim a hardship variance because the property had a reasonable use as a "side yard" and "lawn" under the applicable zoning ordinance and only the plaintiffs' proposal to develop the property in contravention of the zoning ordinance would result in a self-imposed hardship. Accordingly, we concluded that the "BZA did not err in determining that [the] plaintiffs' hardship was self-imposed or in denying [the] plaintiffs' request for a variance on that basis." *Id*.

In *Janssen*, the landowners sought to rezone 100 acres of property from an A-Agricultural Zoning District to an R-1 Single Family Residential Zoning District and to allow the construction of a 250-unit residential development on the property. *Janssen*, 252 Mich App at 198-199. The landowners successfully argued to the zoning board of appeals that the zoning created an unnecessary hardship because rising property taxes caused the land's zoned uses to no longer be economically viable such that the land could not "reasonably be used in a manner consistent with existing zoning." *Id*. at 199, 201. The circuit court upheld the zoning board's decision, and this Court affirmed. *Id*. at 199, 202. In addressing whether the hardship was self-created, we concluded that the "evidence supports the finding that the hardship is not the result of the applicants' own actions. The increasing taxable value of the property and the comparatively low rental income derived are not 'self-created' burdens." *Id*. at 202-203.

Finally, this Court addressed the "self-imposed hardship rule" in *Wolverine Commerce, LLC v Pittsfield Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2008 (Docket No. 282532), p 3 (*Wolverine I*), rev'd 483 Mich 1023 (2009). In that case, the plaintiff purchased a large parcel that was zoned agricultural with the intent to have it rezoned to an industrial planned unit development in order to build a business park. *Wolverine I*, unpub op at 1-2. After the property was rezoned, but before construction began, the plaintiff realized that he had made a "very expensive mistake" and sought to have the property rezoned to R3 moderate density residential. *Id*. at 2. The zoning board denied his request. *Id*. This Court concluded that the self-imposed-hardship rule barred any variance to rezone the property because the plaintiff "*did* cause the prop-

erty to become zoned for uses to which it is—taking [the] plaintiff's factual assertions as true—unsuited." *Id*. at 3. Thus, while the plaintiff had not physically altered the property's characteristics, this Court extended the "self-imposed hardship" rule as a basis to deny rezoning or a variance when the "*legal* conditions imposed on the property [that caused the hardship] . . . were all brought about by the direct efforts of [the] plaintiff and [the] plaintiff's predecessor in title." *Id*.

In *Wolverine Commerce, LLC v Pittsfield Charter Twp*, 483 Mich 1023, 1024 (2009) (*Wolverine II*), our Supreme Court disagreed, concluding that the self-imposed-hardship rule did not bar the property owners from obtaining a variance. The Court declined to expand the self-imposed-hardship rule to instances in which the owners created a legal status on the property that rendered it unfit for the uses for which it was zoned. *Id*. The Court held, "There is no legal precedent to extend the self-imposed hardship rule to prevent a plaintiff who personally sought to conform the property's zoning classification to the municipality's master plan in the first instance from later seeking, in good faith, to rezone the property to another classification to allow a different use." *Id*. Instead, the rule precluded relief when the property owner "subdivided or physically altered the land so as to render it unfit for the uses for which it is zoned, not to cases in which the legal status of the property has been altered." *Id*.

In this case, the City claims that IO bought the property knowing full well there was a billboard ban in effect and, therefore, that any hardship was caused by IO's own actions. In contrast, IO and the BZA argue that IO did not physically alter the property in such a way as to create the hardship at issue. Given the

circumstances in this case, we conclude that the BZA's decision to grant the hardship variance was supported by competent, substantial, and material evidence in the record. There is no evidence in the record that IO did anything but purchase the property, and as the circuit court aptly explained, a landowner may seek any variance the law permits and should not be limited just because they purchased the piece of property knowing the City's ordinances barred a particular use. Indeed, this is a similar business risk to that the plaintiff in *Wolverine I* and *Wolverine II* took when he purchased land zoned industrially with the hope that he could later get the property rezoned. Unlike *Johnson*, *Bierman*, *Cryderman*, and *Janssen*, the hardship here was not caused by the landowner's actions. IO simply purchased the property at a time when there was no permitted reasonable use and took a business risk that the BZA would grant a variance to erect the billboard in the overlay zone.

Importantly, there was no evidence in the record that suggests a previous title owner partitioned the property at all. In fact, the only reference to the parcel's history suggests that it has had the same unique shape and size since well before the 1999 ordinance was enacted. Counsel for IO represented to the BZA that he had researched as far back as the 1950s and could not determine how the property came to be in its current state. Thus, unlike the partition cases of *Johnson* and *Cryderman*, in which the zoning ordinance was clearly in existence before the landowner created his own hardship, what little we know about the history of this parcel suggests that its unique shape was not "rendered unadaptable to any reasonable use" until the ordinance was enacted in 1999. As stated in *Wolverine II*, the self-imposed-hardship rule precluded relief when the property

owner "subdivided or physically altered the land so as to render it unfit for the uses for which it is zoned . . . ." *Wolverine II*, 483 Mich at 1024. There is no evidence that this occurred here.[6]

The BZA did not abuse its discretion when it concluded that the self-imposed-hardship rule was inapplicable under these circumstances and then granted the variance. There is no evidence that the property owner or the predecessor in title took actions after the enactment of the overlay zone that in some way physically altered the land so as to render it unfit for the use for which it is zoned. *Wolverine II*, 483 Mich at 1024. Thus, the use variance was properly granted because IO proved an unnecessary hardship meriting relief under MCL 125.3604(7).

As a final point, the dissent concludes that IO created its hardship when it purchased the property with knowledge of the overlay. As support, the dissent cites a Michigan Supreme Court case and claims that "a purchaser's foreknowledge of a zoning ordinance may be highly relevant, depending on whether the zoning ordinance is otherwise reasonable and the egregiousness of the purchaser's intended violation of that ordinance." See *Jones v DeVries*, 326 Mich 126; 40 NW2d 317 (1949). The cited case does not support the dissent's conclusion here.

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[6] The City urges this Court to adopt the rule set forth in *Massasauga Rattlesnake Ranch, Inc v Hartford Twp Bd of Zoning Appeals*, unpublished opinion of the Court of Appeals of Ohio, issued March 26, 2012 (Docket Nos. 2011-T-0060 and 2001-T-0061). The Ohio Court of Appeals stated the following rule: "A party purchasing a property with knowledge of zoning restrictions cannot claim unnecessary hardship caused by those restrictions for the purposes of a [sic] obtaining a use variance." *Id*. at 4. *Massasauga*, as an out-of-state opinion, is not binding on this Court, *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 414; 761 NW2d 371 (2008), and furthermore, our own precedent's analysis of the self-created-hardship rule, starting with *Johnson*, is clearly distinguishable from Ohio's analysis.

In *Jones*, our Supreme Court addressed whether the zoning board violated a Grand Rapids hardship-relief ordinance when it granted the defendant's request for a variance to build an apartment complex in an area zoned for residential use. *Jones*, 326 Mich at 128, 136. The hardship ordinance at issue gave the zoning board the authority to grant a use variance if " 'the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.' " *Id*. at 137. The *Jones* Court concluded that the zoning board erred because the land could yield a reasonable return through other means allowed in that zone. *Id*. The Court stated, when considering the "plight caused by restrictions in the zoning ordinance, it is somewhat important to note that [the] defendants purchased their interest in this parcel . . . with full knowledge of this zoning ordinance which was previously adopted." *Id*. at 138 (quotation marks omitted). While this fact was "somewhat important," the Court's decision ultimately turned on the fact that "[t]here [was] no showing of a loss of yield of 'reasonable return' if [the] defendants are required to develop and use their present properties within the terms of the existing ordinance." *Id*. In this case, there was no reasonable economic use for the property allowed under the already-existing zoning ordinances. Our Supreme Court in *Jones* did not address whether the self-created-hardship rule would apply in that context, and its proclamation that knowledge of the ordinance is "somewhat important" does not change the result in this case.

The dissent also cites *Faucher v Grosse Ile Twp Bldg Inspector*, 321 Mich 193, 195; 32 NW2d 440 (1948), a case in which the property owners attempted to obtain a permit to build a home on their lot. Because of the dimensional restrictions in the applicable zoning ordinance, it was "impossible" to erect a "practicable build-

ing" on the lot. *Id*. at 198. The defendants refused to issue the permit because the plaintiffs had notice of the zoning ordinance when they purchased the property, claiming that the plaintiffs should have purchased the adjoining lots as well. *Id*. at 199. The Court stated that "[a]s to the contention that [the] plaintiffs purchased with notice of and subject to the restrictions contained in the ordinance, [the] defendants' argument presupposes that the ordinance is valid and reasonable with respect to [the lot]." *Id*. The Court did not find that the harm at issue was self-created; instead, it concluded that the defendants' refusal to issue the permit, considering the zoning ordinance's effect on the property, was "unreasonable and arbitrary." *Id*. at 199-200. Thus, at most, this case supports the conclusion that IO's purchase of the property with knowledge of the ordinance does not preclude the BZA from granting the use variance. For these reasons, the BZA did not err when it granted the use variance on the basis of economic hardship.

Affirmed.

TUKEL, J., concurred with CAMERON, P.J.

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent. On the facts and circumstances of this case, the city of Detroit Board of Zoning Appeals (the BZA) did not have the authority to grant the specific variance at issue, and International Outdoor (IO) was not entitled to that variance. I would find in favor of the city of Detroit (the City) and reverse.

I. FACTUAL BACKGROUND

In 2011, IO purchased a small parcel of property adjacent to an expressway in the City, measuring

approximately 5,520 square feet, for $5,000. At the time of the purchase, the parcel was subject to the City's zoning ordinance banning "off-site" advertising[1] within the "Grand Boulevard Overlay Zone," pursuant to the City's overarching plan to improve the area. IO is a sophisticated and experienced entity, so it either knew or should have known that billboards were not permitted. The BZA initially voted to deny IO's requested use variance, but one board member bizarrely changed her vote after being told that there was not a majority and the variance would not pass, on the apparent basis that the overlay zone was an unimportant concern. IO estimated that the property is worth approximately $5,000.

II. STANDARD OF REVIEW

"[T]here is no single standard of review that applies in zoning cases." *Macenas v Michiana*, 433 Mich 380, 394; 446 NW2d 102 (1989). A zoning appeal board's factual determinations are given deference "if supported by competent, material, and substantial evidence on the record." *Id*. at 395. Decisions based on those factual determinations will likewise be given deference if they are "procedurally proper" and "a reasonable exercise of the board's discretion." *Id*. However, courts do not defer to determinations of law, including "what the ordinance means in relation to the facts . . . ." *Id*. at 395-396 (quotation marks and citation omitted). Issues of statutory construction, including the interpretation and application of ordinances, are reviewed de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003); *Great Lakes*

[1] At oral argument, it was explained that billboards were the "epitome" of "off-site" advertising. In contrast, a business placing a sign for itself on its own premises would be considered permissible "on-site" advertising.

Society v Georgetown Charter Twp, 281 Mich App 396, 407; 761 NW2d 371 (2008). Legal doctrines are likewise reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. PERMISSIBILITY UNDER THE ORDINANCE

The Michigan Zoning Enabling Act (the ZEA), MCL 125.3101 *et seq*., allows municipalities such as the City to adopt zoning ordinance provisions under which use variances can be granted. MCL 125.3604(11). However, in granting such use variances, "the spirit of the zoning ordinance" must be "observed." MCL 125.3604(7). Consistently with the ZEA, the City's zoning ordinance establishes that the BZA is empowered to "perform its duties and exercise its powers as provided for by law in such a way that the purpose and intent of this Zoning Ordinance shall be observed, public safety secured, and substantial justice done." Detroit Zoning Ordinance, § 61-2-41. The ordinance provides for use variances pursuant to its hardship-relief petition procedure. Detroit Zoning Ordinance, § 61-4-101. Under that procedure, if a property owner establishes a "hardship," defined as "a denial of all reasonable economic use of the property," the BZA "*may* provide the petitioner with relief from applicable zoning regulations." Detroit Zoning Ordinance, § 61-4-103 (emphasis added). Any such grant is therefore permissive and discretionary. The hardship-relief procedure does not provide any guidance for exercising that discretion. However, several guides to and restrictions on the BZA's discretion are found elsewhere in the ordinance.

Importantly, a hardship is unambiguously not the only mandatory prerequisite for granting a use variance. Division 6 of the Detroit Zoning Ordinance addresses variances and administrative adjustments and

explicitly provides that variances must comport with *all* 10 enumerated criteria for approval. Detroit Zoning Ordinance, § 61-4-81. One criterion is that "[t]he requested variance or administrative adjustment is consistent with the Master Plan and the spirit, purpose, and intent of this Zoning Ordinance[.]" Detroit Zoning Ordinance, § 61-4-81(1). Another is that "[t]he variance or administrative adjustment shall not permit the establishment, within a zoning district, of any use which is prohibited within the district[.]" Detroit Zoning Ordinance, § 61-4-81(8). These requirements are consistent with the statutory mandate that use variances must comport with "the spirit of the zoning ordinance." MCL 125.3604(7). Indeed, MCL 125.3604(7) explicitly permits use variances only when a hardship is "in the way of carrying out *the strict letter* of the zoning ordinance . . . ." (Emphasis added.) Consequently, although "[a] land use variance essentially is a license to use property in a way not permitted under an ordinance," such variances must not functionally effectuate a rezoning. *Paragon Props Co v Novi*, 452 Mich 568, 575-576; 550 NW2d 772 (1996). In other words, the BZA does not have unfettered discretion to grant any variance merely because doing so would ameliorate a hardship.

Under the City's zoning ordinance, "overlay zones" are geographic subregions with their own special rules above and beyond the regulations otherwise applicable to any given zoning classification. The Grand Boulevard overlay zone at issue only has three such special rules. See Detroit Zoning Ordinance, § 61-11-332. One of those rules prohibits certain advertising signs, as set forth in § 61-6-65. Detroit Zoning Ordinance, § 61-11-332(b).[2] In full, § 61-6-65 provides as follows:

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[2] Two of the rules are irrelevant: one addresses lofts, and the other addresses certain driveways.

> It shall be unlawful to construct, erect, paint, fasten, or affix any new advertising sign, whether billboard or painted wall graphic, on any zoning lot abutting or within the area bounded by East Grand Boulevard, the Detroit River, and West Grand Boulevard. This prohibition in no way limits the right to periodically alter the advertising display on billboards approved for "changeable copy" or to repaint the display on duly licensed painted wall graphics. No lawfully existing advertising sign within said area shall be enlarged or expanded, except upon approval of the Board of Zoning Appeals as provided for in Sec. 61-15-16 of this Code.

Critically, this provision expressly authorizes the BZA to approve an enlargement or expansion of lawfully existing signage while *simultaneously* setting forth an absolute prohibition against new signage. The doctrine of *expressio unius est exclusio alterius* has long been recognized in this state: that "the expression of one thing suggests the exclusion of all others." *People v Wilson*, 500 Mich 521, 526; 902 NW2d 378 (2017); *Williams v Mayor &c, of Detroit*, 2 Mich 560, 563 (1853);[3] *Pine Grove Twp v Talcott*, 86 US (19 Wall) 666, 674-675; 22 L Ed 227 (1873). This provision clearly and narrowly strips the BZA of any power to grant use variances that would permit new signage within the Grand Boulevard overlay zone. Consequently, the BZA is explicitly precluded by § 61-6-65 from granting the use variance at issue.

In addition, the BZA is independently precluded by § 61-4-81 from granting the use variance at issue. As noted, the off-site advertising prohibition is one of only three special rules established for the Grand Boule-

[3] In *Williams*, the Court cautioned that the doctrine may not be used to "do[] manifest violence to the plain intent of the framers of the law . . . ." *Williams*, 2 Mich at 563. In this case, the Detroit Zoning Ordinance, read as a whole, would be undermined if the doctrine is *not* applied.

vard overlay zone. This strongly suggests that the signage prohibition is of great importance to "the spirit, purpose, and intent" of the zoning ordinance. See Detroit Zoning Ordinance, § 61-4-81(1). Consequently, permitting an off-site advertising sign would not merely be a grant of leeway for a technical violation. Rather, it would outright "permit the establishment, within a zoning district, of [a] use which is prohibited within the district[.]" See Detroit Zoning Ordinance, § 61-4-81(8). Consequently, the use variance here could not possibly comport with all 10 criteria mandated by § 61-4-81.

I respectfully believe the majority assembles the ordinance and the zoning enabling statute in the wrong order. Under MCL 125.3604(7), the power given to municipalities to grant use variances based on unnecessary hardships is *expressly restricted*, not absolute. The *statutory mandate* to observe "the spirit of the zoning ordinance" is mirrored by § 61-4-81(1). Because § 61-4-101 establishes that a hardship-relief petition *is* the City's vehicle for granting use variances, § 61-4-81 *must* apply above and beyond merely finding a hardship. Otherwise, § 61-4-81, which establishes requirements for variances, would be nugatory, an outcome we must avoid. *People v Burns*, 5 Mich 114, 117 (1858); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Simply put, the ordinance does not entitle a landowner to a use variance *only* on the basis of establishing an unnecessary hardship, nor does the statute. Because of the additional requirements imposed by the ordinance *and by the statute*, the BZA was not empowered to grant the use variance at issue here. Additionally, the majority notes that there may be "constitutional concerns" under the Fifth Amendment if the variance is not granted. Because the case actually before us is not

a takings claim, nor a constitutional claim of any kind, I decline to consider what "constitutional concerns" are present.[4]

IV. SELF-IMPOSED HARDSHIP

Caselaw has established a legal doctrine known as the "self-imposed hardship" rule, which "applies to preclude relief in taking claims asserted by a property owner who has subdivided or physically altered the land so as to render it unfit for the uses for which it is zoned . . . ." *Wolverine Commerce, LLC v Pittsfield Charter Twp*, 483 Mich 1023, 1024 (2009). The City contends that IO created its own hardship by purchasing property that IO knew could not be used for its intended purpose. Under the circumstances of this case, I agree.

Generally, "a plaintiff who purchases property with knowledge of existing zoning regulations takes the property along with the seller's legal right to challenge those regulations." *Wolverine*, 483 Mich at 1024, citing *Kropf v Sterling Hts*, 391 Mich 139, 152; 215 NW2d 179 (1974). However, *Kropf* only establishes that the constitutionality of an ordinance does not turn on a purchaser's knowledge of that ordinance. *Kropf*, 391 Mich at 152. This case does not involve a constitutional challenge. Consequently, IO's foreknowledge of the zoning ordinance, especially given IO's experience and sophistication, is certainly relevant. See *K & K Constr,*

[4] The majority notes that the parties do not dispute whether the billboard will alter the essential character of the locality. Whether or not that is true, a party "is entitled to the benefit of testimony in support of a verdict in [its] favor despite [its] expression of an opinion inconsistent therewith." *Ortega v Lenderink*, 382 Mich 218, 223; 169 NW2d 470 (1969). Furthermore, courts are not bound by parties' stipulations to mistakes of law. *Magreta v Ambassador Steel Co*, 378 Mich 689, 705; 148 NW2d 767 (1967), rev'd on other grounds 380 Mich 513 (1968).

Inc v Dep't of Environmental Quality, 267 Mich App 523, 556; 705 NW2d 365 (2005). Indeed, our Supreme Court has indicated that a purchaser's foreknowledge of a zoning ordinance may be highly relevant, depending on whether the zoning ordinance is otherwise reasonable and the egregiousness of the purchaser's intended violation of that ordinance. Compare *Jones v DeVries*, 326 Mich 126, 137-139; 40 NW2d 317 (1949), with *Faucher v Grosse Ile Twp Bldg Inspector*, 321 Mich 193, 199-200; 32 NW2d 440 (1948).[5]

As illustrated by the majority's overview of the development of the self-created-hardship rule, its application has always been highly fact-specific. Our Supreme Court's opinion in *Wolverine* appears only to recite the kinds of cases to which the rule has historically applied, and it holds that a landowner who in good faith arranged for the zoning itself to be changed will not run afoul of the rule. Not one of those cases involved a situation like the matter at bar: a highly sophisticated and experienced corporation that spent a pittance on a parcel of property it knew to be unusable, gambling on being able to generate a massive windfall

[5] I respectfully believe the majority misconstrues the intended significance of these cases. As the majority notes, in neither was the "self-imposed hardship" rule, expressly discussed, and the purchasers' foreknowledge of the zoning ordinances proved not to be outcome-determinative. Nonetheless, our Supreme Court stated that "[a]s bearing upon whether [the purchasers] are in a 'plight' caused by restrictions in the zoning ordinance, *it is somewhat important to note* that [the purchasers] purchased their interest in this parcel . . . with full knowledge of this zoning ordinance which was previously adopted." *Jones*, 326 Mich at 138 (emphasis added). The word "important" signifies something more than a trivial side note, so I would find it "more than mere dicta." See *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003). In contrast, *Faucher* merely stands for the established proposition that foreknowledge of an ordinance does not preclude a challenge to its validity. See *Kropf*, 391 Mich at 152. As noted, IO has not brought a constitutional takings claim in the matter at bar.

by flouting an essential part of an entirely reasonable zoning ordinance. Any hardship suffered by IO, beyond owning a parcel of property that is worth its purchase price, is entirely IO's own creation.

I agree with the City that IO created its own hardship here. Therefore, IO was not entitled to receive its requested use variance.

V. CONCLUSION

For all of the reasons listed in this opinion, the BZA was not empowered to grant the use variance permitting IO to install a billboard on the property, and IO was not entitled to any such use variance. I would reverse.

PEOPLE v MAZZIE

Docket No. 343380. Submitted October 3, 2018, at Detroit. Decided October 23, 2018, at 9:20 a.m.

Patrick Mazzie was charged in the Monroe Circuit Court with one count of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and, in a separate case, one count of possession with intent to deliver less than 50 grams of cocaine; one count of receiving and concealing $1,000 or more, but less than $20,000, of stolen property, MCL 750.535(3)(a); and one count of maintaining a drug house, MCL 333.7405(1)(d), after a police search of a vehicle in which he was a passenger revealed a substance that tested positive for cocaine. The police had initially pulled the vehicle over because a search of the Law Enforcement Information Network (LEIN) system indicated that the vehicle did not have the insurance required by state law. Defendant's cell phone, which was also obtained during the traffic stop, contained photographs of drugs and money at a home in Monroe, which was subsequently searched, and the evidence obtained during that search resulted in defendant's arrest in connection with the separate case. Defendant moved to suppress the evidence on several grounds, including that the LEIN insurance check did not give the officers reasonable suspicion to stop the vehicle, that the LEIN information was not reasonably accurate or timely because the database was updated only twice a month, and that the Secretary of State's provision of insurance information to the LEIN was not authorized and violated the confidentiality requirements in MCL 257.227(4). After an evidentiary hearing, the trial court, Daniel S. White, J., granted the motion to suppress the evidence with respect to both cases against defendant, concluding that the LEIN information did not provide the police with reasonable suspicion to stop the vehicle and that the purpose of the LEIN statute was not to provide the information to law enforcement. The prosecution moved for reconsideration, arguing that the information that officers accessed on the LEIN did not reveal any confidential information; that even if there had been a statutory violation, the exclusionary rule would not have been the correct remedy; and that there was reasonable suspicion to

stop the vehicle in light of police testimony that the insurance information on the LEIN was almost always accurate. The court denied the prosecution's motion for reconsideration, and the prosecution filed an application for leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. It was unnecessary to decide whether the Secretary of State's provision of insurance information to police violated the confidentiality requirements of MCL 257.227(4) and MCL 500.3101a(3) because, even assuming that a violation occurred, those statutes provide no remedy for a violation of the confidentiality requirements, the Secretary of State is not a party to this action, and application of the exclusionary rule based on this perceived statutory violation was improper.

2. The trial court erred by excluding the evidence obtained during the vehicle search on the ground that the officers had violated MCL 257.227 or MCL 500.3101a by relying on insurance information in the LEIN system to establish reasonable suspicion. The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreasonable searches and seizures. If there is no determination that a statutory violation constituted an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied. Nothing within MCL 257.227 or MCL 500.3101a, which provide for the confidentiality of insurance information submitted to the Secretary of State, indicated a legislative intent that the drastic remedy of the exclusion of evidence should be applied for violations of these statutes. Moreover, the purpose of the exclusionary rule, which is to sanction police misconduct as a means of deterrence, would not be served by applying the rule in this case because it was the Secretary of State that committed any violation of the statute, not the officers who pulled over the vehicle. Relatedly, the purpose of these statutory provisions was not to deter police misconduct, but to ensure the confidentiality of certain information. Further, there are no constitutional concerns with the officers using this information to establish reasonable suspicion. Therefore, even if the provision of the insurance information to the LEIN system violated MCL 257.227 or MCL 500.3101a, the trial court erred by invoking the exclusionary rule to exclude evidence obtained from the vehicle.

3. The trial court erred by ruling that the twice-a-month updating of the insurance information in the LEIN system was

not frequent enough to provide officers with reasonable suspicion that a crime was being committed. The United States and Michigan Constitutions protect individuals from unreasonable searches and seizures. In determining reasonableness, a court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity. A traffic stop is justified if the officer has an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law, including a traffic law. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, considering the totality of the facts and circumstances. In the present case, the officers had a reasonable suspicion that the driver of the vehicle was violating MCL 500.3102(2), which generally provides that operating an uninsured motor vehicle on a public highway is a misdemeanor. Even accepting the trial court's finding that the insurance information in the LEIN system is updated only twice a month, persuasive decisions from other states and the federal judiciary have uniformly concluded that vehicle-related information older than two weeks is a proper basis to establish reasonable suspicion to pull over a vehicle, particularly with respect to ongoing infractions such as driving without insurance. Further, to justify a stop for Fourth Amendment purposes, police must have only a reasonable suspicion, not probable cause or some other heightened burden, that a traffic violation has occurred or is occurring. The at-most 16-day lapse in up-to-date information made available through the LEIN did not render the information so late or unreliable that it could not provide the officers with reasonable suspicion that the vehicle was uninsured, and nothing in the record suggested that the information was not sufficiently reliable to provide reasonable suspicion that the driver was operating the vehicle without insurance. Moreover, the Court of Appeals has upheld an officer's reliance on LEIN information in finding reasonable cause to arrest an individual subject to a personal protection order listed on the LEIN. In light of the LEIN information and the knowledge, experience, and training of the officer who conducted the stop, the officer had at least a reasonable suspicion that defendant was operating his vehicle without insurance and, therefore, the stop and detention to check for valid insurance was reasonable under the Fourth Amendment.

Order reversed; case remanded for further proceedings.

1. CRIMINAL LAW — SEARCHES AND SEIZURES — EVIDENCE — EXCLUSIONARY RULE — STATUTORY VIOLATIONS — CONFIDENTIALITY OF MOTOR VEHICLE INSURANCE INFORMATION — LAW ENFORCEMENT INFORMATION NETWORK.

The exclusionary rule is a judicially created remedy that originated as a means to protect the constitutional right of citizens to be free from unreasonable searches and seizures; if there is no determination that a statutory violation constituted an error of constitutional dimensions, application of the exclusionary rule to evidence obtained as a result of the statutory violation is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied; although MCL 257.227 and MCL 500.3101a provide for the confidentiality of automobile insurance information supplied to the Secretary of State, the exclusionary rule does not apply to evidence that results from a motor vehicle stop initiated on reasonable suspicion, based on insurance information supplied by the Secretary of State to the Law Enforcement Information Network, that the vehicle was being operated without insurance.

2. CRIMINAL LAW — SEARCHES AND SEIZURES — REASONABLE SUSPICION — LAW ENFORCEMENT INFORMATION NETWORK.

Insurance information obtained by a police officer through the Law Enforcement Information Network may provide the reasonable suspicion necessary to stop a vehicle to determine whether the vehicle is being operated in violation of the statutory requirement that it be insured (US Const, Am IV; Const 1963, art 1, § 11; MCL 500.3101(1); MCL 500.3102(2)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William P. Nichols*, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the people.

Christina D. Hills for defendant.

Before: MURRAY, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

MURRAY, C.J. Defendant was a passenger in a vehicle that was pulled over, and then searched, by city of Monroe police officers. Subsequent to

charges[1] being filed against him, defendant moved to suppress any evidence obtained from the search of the vehicle. According to testimony at the suppression hearing, at least twice a month, the Secretary of State sends information to the Law Enforcement Information Network (LEIN) regarding whether vehicles are insured, as they are required to be by state law. MCL 500.3102. Testimony also established that city of Monroe police officers routinely pull vehicles over if the LEIN indicates that the vehicle is not insured. After the suppression hearing, the trial court granted defendant's motion to suppress on the basis that the insurance information did not provide the officers with reasonable suspicion that a criminal violation existed because the information was not reliable, and the Secretary of State violated state law in supplying the insurance information to the LEIN system. An order was then entered in both cases suppressing any evidence arising from the search and seizure of the vehicle. We granted leave to appeal to determine whether the trial court erred in granting defendant's motion to suppress, *People v Mazzie*, unpublished order of the Court of Appeals, entered May 24, 2018 (Docket No. 343380), and now reverse.

I. FACTS AND PROCEEDINGS

On June 22, 2017, Monroe Police Lieutenant Derek Lindsay and Detectives Aaron Oetjens and Michael Merkle participated in a traffic stop of a vehicle in

[1] In Case No. 17-244015-FH, defendant was charged with one count of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), while in Case No. 17-244016-FH, defendant was charged with one count of possession with intent to deliver less than 50 grams of cocaine, one count of receiving and concealing $1,000 or more, but less than $20,000, of stolen property, MCL 750.535(3)(a), and one count of maintaining a drug house, MCL 333.7405(1)(d).

which defendant was the front seat passenger. The basis for the traffic stop was a LEIN search that indicated that the vehicle did not have insurance. Paul Sanders, the driver of the vehicle that Lieutenant Lindsay stopped, provided Lieutenant Lindsay with insurance information, but the insurance had been cancelled. Thus, the vehicle did not have insurance. Upon searching the vehicle, the officers found small pieces of "an off-white chunky substance" scattered throughout the vehicle, which tested positive for cocaine. The officers also recovered defendant's cellular telephone from defendant's person, and on that phone found "photos of large amounts of money spread out with a scale and then what looked to be cocaine—crack cocaine on a table and other drugs." Defendant was arrested thereafter, but was subsequently released pending these trials.

Forensic analysis of the photographs found on defendant's cell phone provided police with the address in Monroe. A search warrant for that location was issued on September 21, 2017, based in part on the drugs and photographs obtained as a result of the June 22, 2017 traffic stop. That same day, Lieutenant Lindsay and Detectives Merkle and Oetjens participated in the execution of the warrant. When police arrived, defendant was sitting on the back porch and several individuals, including Charles Laney, defendant's codefendant in Case No. 17-244016-FH,[2] were inside the home when the police entered. While searching the home, detectives found powder that tested positive for cocaine, several items associated with the manufacture and delivery of cocaine, an item typically used to carry heroin, and several items that appeared to be stolen.

[2] Case No. 17-244016-FH pertains to the drugs found in the house through execution of the search warrant.

Inside a bedroom police located items associated with the manufacture and delivery of cocaine, as well as paperwork with defendant's name on it. Defendant's wallet was found in the house's kitchen. As a result of this evidence, defendant was arrested a second time.

After he was charged in these two cases, defendant filed a motion to suppress the evidence obtained as a result of the traffic stop and to dismiss both cases against him, setting forth several arguments: (1) the officers did not have reasonable suspicion to stop the vehicle because the LEIN insurance check did not justify the stop, (2) the Secretary of State, who maintains the database on insurance policy information, does not update the database in a timely fashion, (3) an internal Michigan State Police memorandum instructed state troopers not to initiate a traffic stop or arrest an individual for operating a vehicle without insurance based solely on a no-insurance message on the LEIN, and (4) the Secretary of State's provision of insurance policy information to the LEIN was not authorized and violated the confidentiality requirements in MCL 257.227(4).

The trial court held an evidentiary hearing on defendant's motion to suppress the evidence obtained from the traffic stop. During the hearing, uncontested testimony established that when Monroe officers performed a LEIN search they would receive the following information: license plate number; the vehicle's make, model, and year; the vehicle identification number (VIN); the expiration date on the tab; whom the vehicle is registered to; that individual's address; and an electronic insurance verification (EIV) message that has either a "Y" for yes or an "N" for no next to it, i.e., the message would read "EIV=Y" or "EIV=N." Monroe County Sheriff's Deputy Brian Quinn, an officer who

primarily conducts traffic stops, indicated that when he conducts a LEIN search of a license plate, the Secretary of State sends a message with the vehicle's information, the expiration date for the vehicle's plate, and whether the vehicle's insurance is verified. Deputy Quinn indicated that "insurance companies have to verify with the Secretary of State twice a month on the first and the 15th that a vehicle is covered with vehicle insurance." Deputy Quinn also verified that no additional information from the insurer relative to each vehicle was part of the message.

Additionally, Lieutenant Lindsay, Detective Merkle, and Deputy Quinn all testified that they had personally conducted numerous[3] traffic stops based on the EIV=N message and that when the vehicles were pulled over based on that message, the vehicles hardly ever had insurance. Specifically, Detective Merkle estimated that well under 10% of the vehicles he pulled over based on the EIV=N message ended up having insurance, while Deputy Quinn estimated only about 5% had insurance. In other words, based on the officers' experience, the LEIN information was at least 90% accurate.

At the conclusion of the motion hearing, the prosecution argued that Lieutenant Lindsay had reasonable suspicion to pull over the vehicle on June 22, 2017, because the reasonable suspicion standard was "very low" and the "reporting [of insurance is] right the vast majority of the time." The prosecution also asserted that the Secretary of State's provision of this information to the LEIN did not violate the confidentiality requirement

[3] Detective Merkle testified that he had pulled over approximately 100 vehicles based on the LEIN indication that the vehicle had no insurance, while Deputy Quinn ran approximately 20 plates a day through the LEIN.

in MCL 257.227(4) because the Secretary of State was not providing information submitted by the insurer, but was instead providing "a simple message" as to whether insurance exists. Additionally, the prosecution argued that where there is a statutory violation, the exclusionary rule is generally not implicated.

Defendant argued that because the insurance information is only reported to the Secretary of State twice a month, the information on the LEIN was not reasonably accurate or timely and, therefore, could not form the basis for reasonable suspicion. Defendant also reiterated his argument that the provision of this information by the Secretary of State violated the confidentiality requirement in MCL 257.227(4) and MCL 500.3101a(3) and that the information on the LEIN had to be linked to an individual in order to tie it to a vehicle.

The trial court granted the motion to suppress the evidence, concluding that the LEIN information did not provide police with reasonable suspicion to stop the vehicle and, thus, they unlawfully obtained the cell phone pictures. In rendering its decision, the trial court expressed concern that the information provided by the Secretary of State to the LEIN was only updated twice a month. Moreover, the trial court did not believe that the purpose of MCL 257.227 was to provide the information to law enforcement and so the statute was violated by its use within the LEIN system. Ultimately, the trial court entered an order granting defendant's motion to suppress because "the stop of [d]efendant[] [Sanders's] vehicle was unlawful, and any evidence obtained as a result of the stop is suppressed as to both" files "for the reasons stated on the record."

The prosecution filed a motion for reconsideration and attached three new affidavits to its motion. The

prosecution argued that the EIV=N message does not reveal any confidential information and that, "even if there was a statutory violation, the exclusionary rule would not be the correct remedy in this circumstance." Moreover, the prosecution argued that there was reasonable suspicion to stop the vehicle in light of the testimony from Lieutenant Lindsay, Detective Merkle, and Deputy Quinn that the EIV=N message is virtually always accurate and that the trial court "was mistaken as to the nature of the violation being investigated by the traffic stop."

The trial court denied the prosecution's motion for reconsideration, concluding that the "plain language of [MCL 257.227] does not provide for law enforcement's use of the EIV information."[4] The trial court remained concerned about the reporting frequency and, because of its concern with the reliability of the EIV information and its conclusion that the statute was violated, the trial court concluded that the officers could not form reasonable suspicion that a crime was committed. Finally, the trial court concluded that the exclusionary rule was the proper remedy and no exception to the rule applied, and it reaffirmed its decision to suppress the evidence.

II. ANALYSIS

"When reviewing a decision on a motion to suppress, we review a trial court's factual findings for clear error." *People v Mathews*, 324 Mich App 416, 424; 922 NW2d 371 (2018), citing *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014). " '[T]hose findings will be affirmed unless we are left with a definite and firm

[4] It further concluded that supplying a VIN to the LEIN was also contrary to the statute.

conviction that a mistake was made.'" *People v Simmons*, 316 Mich App 322, 325; 894 NW2d 86 (2016), quoting *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). "We review de novo a trial court's ultimate decision on a motion to suppress." *Mathews*, 324 Mich App at 424 (quotation marks and citation omitted). "Questions of statutory interpretation are subject to de novo review." *People v Arnold*, 502 Mich 438, 447; 918 NW2d 164 (2018).

As detailed in Part I of this opinion, the trial court articulated two reasons for granting the motion to suppress: (1) the Secretary of State's provision of insurance information to the LEIN system is not up to date, i.e., it is only provided twice a month, so police lacked reasonable suspicion to pull the vehicle over, and (2) MCL 257.227(4) did not allow the Secretary of State to provide the information to the LEIN system. We address each separately.

A. STATUTORY VIOLATION

One of defendant's two arguments in support of the trial court's ruling is that the Secretary of State's provision of insurance information to police violated the confidentiality requirements of MCL 257.227(4) and MCL 500.3101a(3). However, we need not decide the merits of this argument, for even if we assume that the Secretary of State violated MCL 257.227(4) and MCL 500.3101a(3), those statutes provide no remedy for a violation of the confidentiality requirements, the Secretary of State is not a party to this action, and application of the exclusionary rule was improper based on this perceived statutory violation.

"The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreason-

able searches and seizures." *People v Hawkins*, 468 Mich 488, 498; 668 NW2d 602 (2003). "[T]he aim of the [exclusionary] rule is one of police deterrence," rather than curing the invasion of an individual's right to be free from an unconstitutional search or seizure. *Id*. at 499.

> Irrespective of the application of the exclusionary rule in the context of a *constitutional* violation, the drastic remedy of exclusion of evidence does not necessarily apply to a *statutory* violation. Whether the exclusionary rule should be applied to evidence seized in violation of a statute is purely a matter of legislative intent. [*Id*. at 500.]

"[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." *Id*. at 507. Further, "where the objective of the rule—to sanction police misconduct as a means of deterrence—would not be served," *id*. at 511, the court should permit the proponent to introduce the evidence at trial, *id*. at 512. See also *People v Hamilton*, 465 Mich 526, 534-535; 638 NW2d 92 (2002), overruled in part on other grounds by *Bright v Ailshie*, 465 Mich 770, 775 n 5 (2002); *People v Sobczak-Obetts*, 463 Mich 687, 712; 625 NW2d 764 (2001); *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999). Hence, when addressing the appropriate remedy for a *statutory* violation, the exclusion of evidence is not the go-to, or default, remedy. Instead, the drastic remedy of excluding evidence can only come into play if the legislative intent, gleaned from the words of the statute, permits its use. *Hawkins*, 468 Mich at 500.

Nothing within MCL 257.227 or MCL 500.3101a indicates a legislative intent that the drastic remedy of

the exclusion of evidence should be applied for violations of these statutes. Neither statute indicates that, should the confidential information be shared in a manner other than specifically permitted, the exclusionary rule is applicable. Moreover, the purpose of the exclusionary rule, "to sanction police misconduct as a means of deterrence," would not be served because it was the Secretary of State that committed any violation of the statute, not the law enforcement officers who pulled over the vehicle. *Hawkins*, 468 Mich at 511. Relatedly, the purpose of these statutory provisions is not to deter police misconduct, but to ensure confidentiality of certain information. And finally, as detailed in Part (II)(B) of this opinion, there are no constitutional concerns with the officers using this information to establish reasonable suspicion. Thus, even if the provision of the insurance information to the LEIN system was in violation of the statutes, the trial court erred in invoking the exclusionary rule to exclude evidence obtained from the vehicle. *Id*.

B. RELIABILITY OF INFORMATION

This takes us to the other principal basis[5] for suppression, that being the trial court's conclusion that the twice-a-month updating of the insurance information was not frequent enough to provide officers with reasonable suspicion that a criminal violation existed.

We must first determine whether defendant was subjected to seizure. Because officers stopped the ve-

[5] Defendant also argues that a 2003 Michigan State Police internal memo instructing state troopers not to use this insurance information as a basis to pull over a vehicle supports the trial court's decision. But we do not see how a separate police entity's policy impacts our application of the Fourth Amendment to the use of this information by the Monroe officers.

hicle defendant was riding in, he was seized. *Simmons*, 316 Mich App at 326 ("Under the Fourth Amendment, stopping a vehicle and detaining the occupants amounts to a seizure."). Because defendant was seized when the vehicle was pulled over, and the vehicle was then searched by police, the question becomes—as it frequently does in Fourth Amendment cases—whether the seizure was reasonable.

The reasonableness of the seizure is the pivotal question because the United States and Michigan Constitutions do not protect individuals from all searches and seizures, but only from *unreasonable* searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Henry (After Remand)*, 305 Mich App 127, 137; 854 NW2d 114 (2014). Or, as it is frequently stated, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley v California*, 573 US 373, 381; 134 S Ct 2473; 189 L Ed 2d 430 (2014) (quotation marks and citation omitted). "In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity." *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011).

"A traffic stop is justified if the officer has 'an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law.' " *Simmons*, 316 Mich App at 326, quoting *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). "This includes a violation of a traffic law." *Simmons*, 316 Mich App at 326, citing *Davis*, 250 Mich App at 363. "Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances." *People v Kavanaugh*, 320 Mich App 293,

301; 907 NW2d 845 (2017) (quotation marks and citation omitted). "An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience." *Steele*, 292 Mich App at 315.

In *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996), the Supreme Court stated:

> The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a "reasonably articulable suspicion" that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. [Citations omitted.]

Moreover, in *People v Freeman*, 240 Mich App 235, 236-237; 612 NW2d 824 (2000), we upheld an officer's reliance upon LEIN information in finding reasonable cause to arrest an individual subject to a personal protection order listed on the LEIN.

MCL 500.3102 provides, in relevant part:

> (2) An owner or registrant of a motor vehicle or motorcycle with respect to which security is required, who operates the motor vehicle or motorcycle or permits it to be operated upon a public highway in this state, without having in full force and effect security complying with this section or [MCL 500.3101 or MCL 500.3103] is guilty of a misdemeanor. A person who operates a motor vehicle or motorcycle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall be fined not less than $200.00 nor more than $500.00, imprisoned for not more than 1 year, or both.

The trial court erred in concluding that the June 22, 2017 traffic stop was not supported by reasonable

suspicion. Even accepting the trial court's finding that the insurance information is updated only twice a month, and therefore at worst could be some 16 days old, that delayed reporting time frame does not in any way cause an officer's reliance on the information in making a stop to be unconstitutionally unreasonable. There are at least two reasons for this conclusion.

First, although defendant has provided no caselaw to suggest the "staleness" of this information precludes its use in establishing reasonable suspicion, there are persuasive decisions from our sister states and the federal judiciary that uniformly conclude that vehicle-related information older than two weeks is a proper basis to establish reasonable suspicion to pull over a vehicle. See, for example, *United States v Broca-Martinez*, 855 F3d 675, 680 (CA 5, 2017) ("A state computer database indication of insurance status may establish reasonable suspicion when the officer is familiar with the database and the system itself is reliable. If that is the case, a seemingly inconclusive report such as 'unconfirmed' will be a specific and articulable fact that supports a traffic stop."); *United States v Sandridge*, 385 F3d 1032, 1036 (CA 6, 2004) (holding that information about the status of a driver's license that was three weeks old was sufficiently current to provide reasonable suspicion regarding driving with a suspended license); *United States v Pierre*, 484 F3d 75, 84 (CA 1, 2007) (concluding that five-month-old information about a suspended license provided an officer with reasonable suspicion that the driver was still driving with a suspended license); *Tucker v State*, 174 So 3d 485, 487 (Fla App, 2015) (holding that a 40-day-old vehicle description provided reasonable suspicion to pull it over); *Commonwealth v Farnan*, 55 A3d 113, 117-118; 2012 PA Super 221 (2012) (stating that license status information 30 days old was not

stale, and provided reasonable suspicion for officer to pull over a vehicle); *State v Spillner*, 116 Hawaii 351, 363; 173 P3d 498 (2007) (holding that one-week-old insurance information, and two-week-old license information, was not stale and provided reasonable suspicion to validly pull over the vehicle); *State v Duesterhoeft*, 311 NW2d 866, 867-868 (Minn, 1981) (concluding that 30-day-old knowledge that driver was unlicensed was not stale and provided reasonable suspicion to pull over the vehicle).

A good explanation of the principles relied upon in these and other decisions is found in *United States v Cortez-Galaviz*, 495 F3d 1203, 1209 (CA 10, 2007), where now Justice Gorsuch wrote for the court that insurance information 20 days old was not stale and provided the officer with reasonable suspicion to pull over the vehicle:

> Finally, Mr. Cortez-Galaviz complains that, whatever else one might say about the information on which Officer Rapela relied, the "no information found" alert issued by Insure-Rite in this case was 20 days old, dated September 30, 2005. In assessing this argument, we note at the outset that timeliness of information is but one of many factors in the mix when assessing whether reasonable suspicion for an investigatory detention exists, and the relative importance of timeliness in that mix depends on the nature of the criminal activity at issue. Thus, for example, when the legal infraction at issue typically wears on for days or weeks or months (like, say, driving without a license or appropriate emissions and safety certifications), rather than concludes quickly (like, say, jaywalking or mugging), the timeliness of the information on which the government relies to effect an investigative detention "recedes in importance" compared to other factors, such as the type and duration of offense at issue.
>
> Here, Officer Rapela's stop was aimed at investigating a possible violation of Utah's vehicle insurance laws, an

> offense that neither party argues is transitory in nature. He indisputably relied on the most current information available to a patrolling officer. And Mr. Cortez-Galaviz offers us no other evidence or argument to suggest that reliance on a 20 day old alert is in any way or wise unreasonable given the nature of available technology, the offense or detention at issue, or the practical challenges associated with coordinating the dissemination of registration and insurance information for every motor vehicle on the road. Under these circumstances and on this record, therefore, we agree with the district court that a delay of 20 days between an alert and an officer's inquiry does not, by and of itself, nullify a traffic stop on the basis of a "not found" insurance report. [Citations omitted.]

Several important principles are contained in these decisions that bear on our decision. For one, because driving without insurance is an "ongoing" infraction, there is less of a concern for "staleness" than there would be for a crime that has already occurred. See *Cortez-Galaviz*, 495 F3d at 1209; *Tucker*, 174 So 3d at 487. If a driver did not have insurance for his or her vehicle just over two weeks earlier, it is likely he or she does not currently have it. Though there can be no certainty in that premise, there does not need to be. This takes us to the second principle. To justify a stop for Fourth Amendment purposes, police must only have a reasonable *suspicion*, not probable cause or some other heightened burden, that a traffic violation has occurred or is occurring. *Duesterhoeft*, 311 NW2d at 868. All that is required is that officers "have more than a 'mere hunch' that the person stopped is engaged in illegal activity, [because] 'reasonable suspicion need not rise to the level of probable cause.' Indeed, it requires only 'some minimal level of objective justification for making the stop.' " *Broca-Martinez*, 855 F3d at 678 (quotation marks and citations omitted).

Here, the at-most 16-day lapse in up-to-date information made available through the LEIN did not render the information so late or unreliable that it could not provide the officers with reasonable suspicion that the vehicle was uninsured. The officers' unrefuted testimony was that the insurance information was extraordinarily *accurate*, and even without that testimony, nothing in the record suggests that the information was not sufficiently reliable to provide reasonable suspicion that the driver was operating the vehicle contrary to MCL 500.3101. This is particularly so given that the insurance information was received from the entity required by law to maintain it, and even if the insurance information was two weeks old, given the continuing nature of the violation, it was enough to provide officers with a minimal level of objective justification for a stop. Consequently, in light of the LEIN information and Lieutenant Lindsay's knowledge, experience, and training, we hold that Lieutenant Lindsay had at least a reasonable suspicion that defendant was operating his vehicle without insurance and, therefore, the stop and detention to check for valid insurance was reasonable under the Fourth Amendment. See *State v Leyva*, 599 So 2d 691, 693 (Fla App, 1992).

The trial court's order suppressing the evidence is reversed, and this matter is remanded for further proceedings. We do not retain jurisdiction.

BORRELLO and RONAYNE KRAUSE, JJ., concurred with MURRAY, C.J.

PEOPLE v COURSER

Docket No. 341817. Submitted October 9, 2018, at Lansing. Decided October 23, 2018, at 9:25 a.m. Leave to appeal denied 503 Mich 1002 (2019).

Todd A. Courser, a former member of the Michigan House of Representatives, was charged in the Ingham Circuit Court with perjury, MCL 750.423, and misconduct in office, MCL 750.505, in connection with his testimony before a House Select Committee convened to evaluate claims of misconduct that called into question his qualifications to hold office. In August 2015, the House passed a resolution to create the committee in order to examine, among other things, defendant's qualifications. To that end, the Michigan House of Representatives Business Office prepared an investigative report in which it concluded that defendant had engaged in misconduct in office, in part because the evidence indicated that defendant had forced members of his staff to forge his signature on three "bluebacks"—that is, the copy of a bill with a blue backing that is used for the signatures of sponsoring members. During the misconduct hearings before the House Select Committee, defendant testified under oath that while he had instructed his staff to sign his name to the three bluebacks, he had first asked his chief of staff, Keith Allard, to confirm with the business office that such signage practice was allowed. While defendant asserted that Allard told him that there was no problem with others signing defendant's signature on the bluebacks, Allard denied that defendant had directed him to consult the business office for that purpose and that, in fact, defendant simply wanted his name signed to the bluebacks because he would not be present on the day the bills arrived. Defendant moved for summary disposition and to dismiss the perjury charge, arguing that he had legislative immunity under the Speech or Debate Clause of Michigan's 1963 Constitution for any statements made before the committee. In addition, defendant moved in limine to exclude testimony of certain conversations he had with staff, arguing that the conversations were inadmissible because of legislative immunity and because of the Speech or Debate Clause's evidentiary-privilege rule. The court, James S. Jamo, J., denied the motion, reasoning that defendant did not

have legislative immunity to make false statements under oath. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. Const 1963, art 4, § 11, also known as the Speech or Debate Clause, provides that, except as provided by law, senators and representatives are privileged from civil arrest and civil process during sessions of the Legislature and for five days next before the commencement and after the termination thereof and that senators and representatives shall not be questioned in any other place for any speech in either the House or the Senate. Michigan's Speech or Debate Clause is construed similarly to that found in the United States Constitution because the clauses are substantially similar, and when it applies, the Speech or Debate Clause provides protection against civil as well as criminal actions. The Speech or Debate Clause was designed to assure a coequal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the executive branch. The clause protects conduct that is within the legislative sphere, and those protections are absolute. The protections apply to legislative acts that are an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters that the Constitution places within the jurisdiction of either the House or the Senate. In that regard, a representative's testimony before a committee regarding his or her qualifications for office does not constitute a legislative act because it does not involve an act that is integral to the legislative process. In this case, while the committee was acting within the legislative sphere when it questioned defendant about his qualifications to hold office, defendant's testimony in the hearing did not constitute a protected legislative act under the Speech or Debate Clause; instead, the testimony underlying his perjury charge addressed his misconduct in office and was not integral to the legislative process. Accordingly, the trial court correctly determined that defendant's testimony before the committee was not protected by the Speech or Debate Clause and that his statements could therefore be used against him in his prosecution for perjury.

2. Even if a legislator is not immune from prosecution under the Speech or Debate Clause, the clause provides an evidentiary privilege for the legislator. In that regard, evidence of the member's legislative acts and legislative status—for example, evidence of the legislator's committee memberships—may not be introduced by the government in a prosecution. However, the act

of testifying before a grand jury is not an act protected by the Speech or Debate Clause. The evidentiary-privilege rule of the Speech or Debate Clause extends to matters beyond pure speech or debate in either the House or the Senate, but only when necessary to prevent indirect impairment of such deliberations. In that regard, while the signing and submission of proposed legislation can be necessary or integral to the legislative process, the evidentiary-privilege rule does not prohibit inquiry into illegal conduct simply because there is some nexus between the conduct and legislative functions. A legislator's personnel decisions are protected by the Speech or Debate Clause only if those decisions constitute legislative acts. Accordingly, courts must distinguish between true legislative acts, which are entitled to absolute immunity, and acts that merely happen to have been performed by a legislator but are functionally administrative in nature; the act of physically signing legislation is administrative in nature, and the circumstances surrounding that act are not protected by the evidentiary-privilege rule. In other words, the key factor in determining whether a legislator is entitled to immunity for a personnel decision is the nature of the function being performed. The analysis turns on whether it will be necessary to inquire into the legislator's legislative acts—how the legislator spoke, debated, or voted, or anything he or she did in the chamber or in committee—in order to prove a claim. In this case, although it was related to the legislative process, signing bluebacks was an administrative function. Defendant's testimony before the committee addressed his potential misconduct in office, not the legislative process related to the bills, and the investigation into how the bluebacks were signed was not precluded simply because that conduct had some nexus to his legislative functions. Accordingly, a prosecution based on defendant's testimony before the committee did not violate the evidentiary-privilege rule of the Speech or Debate Clause. For the same reason, defendant's conversations with Allard, House members, and other staff members about signing the bluebacks was not protected by the evidentiary-privilege rule.

Affirmed.

1. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — LEGISLATIVE IMMUNITY — QUALIFICATIONS FOR OFFICE.

The Speech or Debate Clause of Michigan's Constitution provides that, except as provided by law, senators and representatives are privileged from civil arrest and civil process during sessions of the Legislature and for five days next before the commencement and after the termination thereof and that senators and representa-

tives shall not be questioned in any other place for any speech in either the House or the Senate; the clause protects conduct that falls within the legislative sphere, and those protections are absolute; the protections apply to legislative acts that are an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters that the Constitution places within the jurisdiction of either the House or the Senate; a representative's testimony before a committee regarding his or her qualifications for office does not constitute a legislative act because it does not involve an act that is integral to the legislative process (Const 1963, art 4, § 11).

2. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — LEGISLATIVE IMMUNITY — IMMUNITY APPLIES IN CIVIL AND CRIMINAL ACTIONS.

The Speech or Debate Clause states that, except as provided by law, senators and representatives are privileged from civil arrest and civil process during sessions of the Legislature and for five days next before the commencement and after the termination thereof and that senators and representatives shall not be questioned in any other place for any speech in either the House or the Senate; when it applies, the Speech or Debate Clause provides protection against civil as well as criminal actions (Const 1963, art 4, § 11).

3. CONSTITUTIONAL LAW — SPEECH OR DEBATE CLAUSE — EVIDENTIARY-PRIVILEGE RULE — LEGISLATIVE ACTS.

The evidentiary-privilege rule of the Speech or Debate Clause of Michigan's Constitution provides that evidence of the member's legislative acts or legislative status may not be introduced by the government in a prosecution; a legislator's personnel decisions are protected by the Speech or Debate Clause only if those decisions constitute legislative acts; in that way, courts must distinguish between true legislative acts, which are entitled to absolute immunity, and acts that merely happen to have been performed by a legislator but are functionally administrative in nature; the act of physically signing legislation is administrative in nature, and the circumstances surrounding that act are not protected by the evidentiary-privilege rule (Const 1963, art 4, § 11).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Christopher M. Allen*, Assistant Attorney General, for the people.

DePerno Law Office, PLLC (by *Matthew S. DePerno*) for defendant.

Before: BECKERING, P.J., and RIORDAN and CAMERON, JJ.

CAMERON, J. Defendant, Todd Courser, a former member of the Michigan House of Representatives, was charged with perjury, MCL 750.423, on the basis of his testimony before a House Select Committee convened to evaluate claims of misconduct that called into question his qualifications to hold office. Courser moved to dismiss the charge, claiming legislative immunity under the Michigan Constitution's Speech or Debate Clause, Const 1963, art 4, § 11. On December 14, 2017, the trial court denied the motion, reasoning that Courser does not have legislative immunity to make false statements under oath. This Court granted Courser's interlocutory appeal.[1] On appeal, Courser claims, *inter alia*, that the trial court erred when it denied his motion to dismiss because he is entitled to legislative governmental immunity and an evidentiary privilege. We disagree and therefore affirm.

I. FACTUAL BACKGROUND

In November 2014, Courser was elected to the Michigan House of Representatives. On August 19, 2015, the House passed a resolution "to create a House select committee to examine the qualifications of Representative Cindy Gamrat . . . and Representative Todd Courser . . . and determine their fitness to continue holding the high office to which they were elected." House Resolution 129 (August 19, 2015). In

[1] *People v Courser*, unpublished order of the Court of Appeals, entered March 28, 2018 (Docket No. 341817).

an investigative report, the House Business Office found that Courser had engaged in misconduct while in office. Relevant to this appeal, the House Business Office found that

> [t]here is testimonial and physical evidence that Representatives Courser and Gamrat forced their staff to forge their signatures on three bill "bluebacks"[2] for introduction, namely House Bills 4174, 4317, and 4318. According to their staff, this was done in an attempt to quickly subvert the efforts of other Representatives to introduce similar legislation. [Michigan House of Representatives Business Office, *Report on the Investigation of Alleged Misconduct by Representative Todd Courser and Representative Cindy Gamrat* (August 31, 2015), p 4.]

Courser's perjury charge was the result of testimony he gave during a House Select Committee hearing. When asked if he instructed or allowed his staff to forge his signature on the bluebacks, Courser stated:

> No, I did not. What—I think that needs some clarification. Forging, obviously, is done without my knowledge or without my consent. The—the events that led up to—to that week, I can explain, if you wanna hear it. If you don't, somebody can object, I guess. Inside of that, the—I wasn't going to be available the day that those came back. I spoke to my chief of staff. I asked what was the process to be able to do that. In the legal profession, we do it. It's called signing for another. And so you can sign for other attorneys, attorneys I've never met, with their permission. And so I was—I was falling under that.
>
> I asked my chief of staff at that point to speak with the [House] Business Office to say, is there an exception for that? My understanding was, and they affirmed to me, that, yes, it was not a problem to do that. I should've checked myself in regards to that. But that's actually how

[2] A "blueback" is "the copy of a bill with a blue backing that is used for the signatures of sponsoring members." Michigan Legislative Council, *2017-2018 Legislative Briefing Book* (May 2017), p 71.

> it happened. So when they came back, they let me know. And I said, yeah, well, if—if it's okay, go ahead and do it. So I should've checked and been more involved in that.

On September 11, 2015, Courser resigned from office, and in February 2016, he was charged with perjury and three counts of misconduct in office. At the preliminary hearing, Courser's former legislative director, Joshua Cline, testified for the prosecution that he signed the bluebacks at Courser's direction. Cline stated that Courser lied at the Select Committee hearing, claiming his testimony "wasn't even remotely close to the truth that I knew." According to Cline, Courser simply instructed him to "just get it done."

Benjamin Graham, whom Cline described as Courser's director of constituent services, also testified that Courser never asked him to contact the House Business Office to learn whether his staff could sign his name "to blue back legislation." Keith Allard, whom Cline described as the chief of staff for Courser's and Gamrat's combined office, testified that Courser wanted to submit proposed legislation before another representative did so and, because he was not going to be present on the day the bills arrived, "he wanted a staff member to sign his name to that legislation." With respect to "signing blue backs," Allard denied that Courser directed him to consult the House Business Office for that purpose. The district court bound Courser over on the perjury charge and one charge of misconduct in office, MCL 750.505.

Courser filed a number of motions in circuit court, including a motion to dismiss, a motion for summary disposition, and a motion in limine to exclude testimony of conversations that he claimed had legislative-immunity protection. The trial court addressed the numerous motions at a hearing held on December 14,

2017. The trial court concluded that Courser did not have legislative immunity to lie under oath, regardless of the committee's purpose at the hearing. Thereafter, the trial court entered an order denying the motion to dismiss, the motion for summary disposition, and the motion in limine. On appeal, Courser argues that the trial court erred because he is afforded legislative immunity under the Speech or Debate Clause of the Michigan Constitution, Const 1963, art 4, § 11, that any conversations he had with House staff were inadmissible because of legislative immunity and the evidentiary-privilege rule, and that the trial court should not have considered the prosecution's responsive brief because it was filed late.

II. STANDARDS OF REVIEW

This Court reviews de novo constitutional issues. *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009). A trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

III. ANALYSIS

Courser's testimony before the House Select Committee was not a legislative act. Accordingly, he is not entitled to legislative immunity from the perjury charge. Furthermore, Courser's testimony and conversations relating to the signing of bluebacks are not protected by the evidentiary privilege under the Speech or Debate Clause. Therefore, Courser's claims are without merit.

A. LEGISLATIVE IMMUNITY

The Speech or Debate Clause of the 1963 Michigan Constitution provides:

> Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house. [Const 1963, art 4, § 11.][3]

The second sentence is at issue in this case. "Read literally, the [second] clause only provides senators and representatives with immunity for speeches made in either house—that is, from being 'questioned in any other place for any speech in either house.' " *Cotton v Banks*, 310 Mich App 104, 112; 872 NW2d 1 (2015). However, "[b]ecause Michigan's Speech or Debate Clause is substantially similar to the Speech or Debate Clause found in the Constitution of the United States,[4] it should be similarly construed." *Id*.

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[3] The "immunity" granted by this provision was codified in 1984. *Wilkins v Gagliardi*, 219 Mich App 260, 271; 556 NW2d 171 (1996). MCL 4.551 provides, "A member of the legislature of this state shall not be liable in a civil action for any act done by him or her pursuant to his or her duty as a legislator."

[4] The Speech or Debate Clause of the United States Constitution provides as follows:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. [US Const, art I, § 6, cl 1.]

This Court first incorporated principles governing the federal clause in *Prelesnik v Esquina*, 132 Mich App 341, 347; 347 NW2d 226 (1984).

The Speech or Debate Clause "should be read broadly to effectuate its purpose . . . ." *Prelesnik v Esquina*, 132 Mich App 341, 347; 347 NW2d 226 (1984), citing *Eastland v United States Servicemen's Fund*, 421 US 491, 503; 95 S Ct 1813; 44 L Ed 2d 324 (1975). "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v United States*, 408 US 606, 616; 92 S Ct 2614; 33 L Ed 2d 583 (1972); see also *United States v Johnson*, 383 US 169, 181; 86 S Ct 749; 15 L Ed 2d 681 (1966) (stating that the clause's purpose was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary").

The Speech or Debate Clause's protections are absolute. *Eastland*, 421 US at 501. However, "[i]n order for the conduct to be protected under the Speech or Debate Clause, it must fall within the legislative sphere." *Wilkins v Gagliardi*, 219 Mich App 260, 268; 556 NW2d 171 (1996). "The heart of the Clause is speech or debate in either House." *Gravel*, 408 US at 625. In order for the clause to apply to other legislative acts,

> they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. [*Id*.]

"A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it." *United States v Brewster*, 408 US 501, 512; 92 S Ct 2531; 33 L Ed 2d 507 (1972).

Michigan courts have applied the current Speech or Debate Clause to civil actions only. See *Cotton*, 310

Mich App at 116 ("A legislator is immune from civil liability for any activities that fall within the legislative sphere.") (quotation marks and citation omitted). However, the United States Supreme Court has "long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." *Eastland*, 421 US at 502-503. The Court has read its decision in *Johnson*, 383 US 169, as holding "that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 US at 512.

In this case, the parties dispute whether Courser's testimony before the House Select Committee constitutes an act protected by the Speech or Debate Clause. We conclude that a legislator's testimony in a hearing to determine that person's qualifications to hold office is not a protected legislative act under the Speech or Debate Clause.

The Select Committee was certainly engaged in a protected activity when it convened to examine Courser's qualifications. "The power to investigate and to do so through compulsory process plainly falls within" the legislative sphere. *Eastland*, 421 US at 504; see also *Hutchinson v Proxmire*, 443 US 111, 124; 99 S Ct 2675; 61 L Ed 2d 411 (1979) (noting "that committee hearings are protected [by the Speech or Debate Clause], even if held outside the Chambers; committee reports are also protected"). The United States Supreme Court "has often noted that the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legis-

lation is intended to affect or change.' " *Eastland*, 421 US at 504, quoting *McGrain v Daugherty*, 273 US 135, 175; 47 S Ct 319; 71 L Ed 580 (1927) (alteration in *Eastland*). Further, the House has constitutional authority to determine the qualifications of its members. Const 1963, art 4, § 16. In *Rangel v Boehner*, 415 US App DC 60, 64-66; 785 F3d 19 (2015), the court determined that a congressional disciplinary proceeding was a legislative matter and that therefore the defendants, including the presiding House members, were immune from suit brought by the censured member.

But the question in this case is whether Courser, as a testifying witness[5] before the House Select Committee, was acting within the legislative sphere. The prosecution identifies two cases supporting the conclusion that he was not.

In *Fed Election Comm v Wright*, 777 F Supp 525, 527-528 (ND Tex, 1991), a former House member (James C. Wright, Jr.) argued that, under the Speech or Debate Clause, he did not have to answer questions posed to him by the Federal Election Commission. The federal district court rejected that argument, primarily because the questions "quite clearly are directed to development of information concerning activities occurring outside, and away from, the House, and which are totally unrelated to anything done in the course of the legislative process or any motivation for any such thing." *Id*. at 529. The court also rejected Wright's argument that his previous testimony[6] before the House Committee on Standards of Official Conduct

[5] Courser's contention that he was not a witness at the hearing is without merit. A "witness" is "[o]ne who gives testimony, under oath or affirmation . . . ." *Black's Law Dictionary* (7th ed).

[6] Wright had not yet resigned from office when he testified before the Committee. *Wright*, 777 F Supp at 532.

immunized him "from being required to give testimony on the same subject in any other context . . . ." *Id*. at 530. The court reasoned that

> [t]his argument overlooks that any testimony given by Wright to the Committee on Standards was given by him in his capacity as a witness and not in his legislative capacity with the consequence that no immunity attached by virtue of the Clause. The report [generated by the Committee] itself undoubtedly should be viewed to be a legislative act, and there is no doubt that legislative acts went into the preparation of the report. However, none of those legislative acts were of Wright. He is no more protected from the use of the report than is any other citizen. [*Id*. at 530.]

The prosecution also relies on *United States v Rose*, 307 US App DC 314, 315-316; 28 F 3d 181, 182 (1994), in which the Department of Justice brought a civil action against a congressman (Charles G. Rose III) on the basis of his testimony before the House Committee on Standards of Official Conduct. The Court of Appeals for the District of Columbia Circuit held that the clause did not apply because Rose's testimony did not relate to legislation:

> The testimony related to allegations that Congressman Rose had violated the Ethics Act by failing to report various personal loans and included detailed explanations of each financial transaction at issue. The testimony was not addressed to a pending bill or to any other legislative matter; it was, instead, the Congressman's defense of his handling of various personal financial transactions. In short, Congressman Rose was acting as a witness to facts relevant to a congressional investigation of his private conduct; he was not acting in a legislative capacity. [*Id*. at 321 (citation omitted).]

The court indicated that it was irrelevant that Rose's statements were made in a committee room rather

than on the House floor: "[W]e rely not on the fact that Congressman Rose testified in a committee room but on the fact that his testimony was given in a personal capacity rather than 'in the performance of [his] official duties'; we focus on what Congressman Rose said, not where he said it." *Id*. (second alteration in original). The court also emphasized that its decision was based on "the content of the [congressman's] speech," stating that "the key factor is the subject matter of the speech, not the identity of the listener." *Id*. at 322.

Wright and *Rose* support the prosecution's position that a representative testifying before a House committee concerning the representative's qualifications to hold that office is not performing a legislative act. In both cases, the House Committee on Standards of Official Conduct was investigating the individual representative's personal conduct, and the testimony of each individual representative did not relate to the legislative process. The same is true in this case. The hearing was convened to examine Courser's qualifications to hold office. Courser focuses on the fact that the allegedly perjurious statement related to the signing of legislation. As will be discussed later in this opinion, there is an evidentiary privilege to the Speech or Debate Clause. Any statement made by Courser that is protected by the Speech or Debate Clause cannot be used as evidence against him. But, as a general matter, Courser's testimony was addressing his misconduct in office. Therefore, he was not performing an act integral to the legislative process, and he is not entitled to the absolute protections of the Speech or Debate Clause.

We see no issue in concluding that the Speech or Debate Clause does not protect Courser even though it protects the members of the Select Committee questioning him. Courser relies on *Allard v Mich House of*

Representatives, 200 F Supp 3d 703 (WD Mich, 2016), an action brought by Allard and Graham in which they claimed that they were wrongly terminated for reporting Courser's and Gamrat's misconduct. In that case, the plaintiffs "acknowledg[ed] that statements made during the committee proceedings are subject to legislative immunity." *Id*. at 711-712. Viewed in context, the plaintiffs merely conceded that statements made by defendant at the hearing(s) were subject to legislative immunity; the court did not decide the issue. In any event, although the House Select Committee was not investigating Courser for the purpose of enacting legislation, the Select Committee was performing its constitutional duty. Const 1963, art 4, § 16 ("Each house shall be the sole judge of the qualifications, elections and returns of its members . . . .").

Even though legislation was not at issue, the House's independence is protected by immunizing it from civil suits based on statements made in a qualifications hearing like Courser's. In contrast, no policy consideration is furthered by insulating Courser's testimony before the House Select Committee. Courser was not testifying regarding legislative matters. Rather, he was testifying in his personal capacity in an attempt to prove that he was fit to hold office, a matter which simply does not implicate the policies behind the Speech or Debate Clause. For those reasons, the Speech or Debate Clause does not protect Courser from prosecution.

B. EVIDENTIARY PRIVILEGE

Even if a legislator is not immune from prosecution, "evidence of a legislative act of a Member may not be introduced by the Government" in that prosecution. *United States v Helstoski*, 442 US 477, 487; 99 S Ct

2432; 61 L Ed 2d 12 (1979). In *Helstoski*, 442 US at 479-480, a congressman testified before (and produced evidence to) grand juries investigating him for political corruption, including allegations that he had introduced "private bills" in exchange for money. The congressman was eventually charged "with various criminal acts" and sought to dismiss the indictment on the ground that it violated the Speech or Debate Clause. *Id*. at 484. Ultimately, the Supreme Court upheld the lower court's evidentiary ruling that the government would not be allowed to introduce evidence regarding the defendant's past legislative acts. *Id*. at 484-485, 488-489; see also *Johnson*, 383 US at 185-186 (holding that a former congressman was entitled to a new trial when the prosecutor questioned him about a speech he gave in the House, and the motives thereof, which were subjects protected by the Speech or Debate Clause).

United States v Swindall, 971 F2d 1531 (CA 11, 1992) is instructive as to how evidentiary privilege is applied in a perjury prosecution. In that case, a congressman (Patrick L. Swindall) appeared before a grand jury investigating money-laundering activities as a "subject" of that investigation. *Id*. at 1538. "In the grand jury proceeding, the [government] sought to establish, by questioning Swindall, that because of his memberships on the House Banking and Judiciary Committees, Swindall had knowledge of the money-laundering and transaction-structuring statutes." *Id*. at 1539. Following his grand jury appearance, Swindall was charged with numerous counts of perjury before the grand jury. *Id*. at 1538. At trial, the government used Swindall's committee memberships to show that he had "lied when he told the grand jury that he was not convinced of the criminality of the proposed transactions" for which he was being investigated. *Id*. at 1539. Swindall was subsequently convicted of nine

counts of perjury. *Id*. at 1539. The Eleventh Circuit held that the government's questions before the grand jury about Swindall's committee memberships and the references to those memberships at trial violated the Speech or Debate Clause. *Id*. at 1543. Consequently, the court dismissed the three counts of perjury relating to that evidence. *Id*. The court determined that the Speech or Debate Clause "privilege protects legislative status as well as legislative acts." *Id*. at 1543. Further, the court concluded that an inquiry into Swindall's committee membership essentially constituted an inquiry into his legislative activities. *Id*. at 1546.

The act of testifying before a grand jury is not an act protected by the Speech or Debate Clause. See *United States v Dowdy*, 479 F2d 213, 224 (CA 4, 1973). This is a nuanced distinction. In *Swindall*, 971 F2d at 1543, 1546, the congressman could not be prosecuted for perjury for testimony related to protected legislative activities. In this case, Courser argues that the statements he made to the House Select Committee relating to the signing of bluebacks are plainly "within the 'legislative sphere' " and so are protected by the Speech or Debate Clause.

Courser's allegedly perjurious testimony bears some relation to the legislative process. The signing and submission of proposed legislation could be considered necessary or "integral" to the legislative process. *Gravel*, 408 US at 625. But "[t]he Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Brewster*, 408 US at 528. "[C]ourts have extended the privilege to matters beyond pure speech or debate in either House, but 'only when necessary to prevent indirect impairment of such deliberations.' " *Gravel*, 408 US at 625 (citation omitted).

A recent decision by this Court is helpful in analyzing whether statements regarding the signing of bluebacks should be protected by the Speech or Debate Clause. In *Cotton*, 310 Mich App at 122-123, this Court adopted "the functional approach stated in *Forrester* [*v White*, 484 US 219; 108 S Ct 538; 98 L Ed 2d 555 (1988)]"[7] for determining whether a personnel decision is a legislative act protected by the Speech or Debate Clause. "In applying that approach, courts should be careful to distinguish between true legislative acts, which are entitled to absolute immunity, and acts that merely happen to have been performed by a legislator, but are otherwise administrative in nature." *Cotton*, 310 Mich App at 123. This analysis turns on whether it will be necessary to "inquire into the legislator's legislative acts—'how [the legislator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee'—in order to prove the claim." *Id.*, quoting *Fields v Office of Eddie Bernice Johnson*, 373 US App DC 32; 459 F3d 1 (2006) (alteration in *Cotton*).

Signing legislation, while obviously related to the legislative process, is an administrative function. The pertinent testimony does not involve substantive discussion of the bills Courser was introducing or his reasons for doing so. Although the Speech or Debate Clause should be read broadly to accomplish its purpose, Courser is not being prosecuted for any speech, debate, or deliberation pertaining to the bills. Rather, he is being prosecuted for statements he made at a hearing called to address his potential misconduct in office. Inquiry into his conduct is not precluded "simply

[7] *Forrester* concerned "whether a judge had absolute immunity from suit under the common law for allegedly terminating an employee on the basis of her sex in violation of the federal Civil Rights Act." *Cotton*, 310 Mich App at 117-118.

because it has some nexus to legislative functions." *Brewster*, 408 US at 528. For those reasons, a prosecution based on Courser's testimony before the House Select Committee does not violate the evidentiary-privilege rule of the Speech or Debate Clause.

Courser also argues that his "initial conversation" with Allard, his chief of staff, "about whether someone could sign a blue back on behalf of [Courser]" is protected by the Speech or Debate Clause. He adds that "[a]ny conversation between [Courser] and any other House member o[r] staff member is equally protected from disclosure." As with his testimony, it is the substance of Courser's conversations that determines whether the Speech or Debate Clause applies. See *Gov't of the Virgin Islands v Lee*, 775 F2d 514, 522 (CA 3, 1985) ("It is the content of [the Virgin Islands legislator's] private conversations [with government officials], and not the mere fact that the conversations took place, that determines whether [he] is entitled to legislative immunity."). For the reasons already discussed, Courser's conversations about signing the bluebacks are not protected by the Speech or Debate Clause.

With respect to Allard, the prosecution notes that the trial court "ruled that Allard could testify [that] Courser never asked him to check with the House Business Office." But Courser is not arguing that this specific conversation is protected by the Speech or Debate Clause. Courser notes that there is evidence that he and Allard discussed whether a staff member could sign Courser's name to a blueback. In other words, Courser is arguing that, as a general matter, *any* conversation about signing bluebacks is protected, which presumably includes whether Courser directed Allard to the House Business Office to determine if

someone could sign the bluebacks on Courser's behalf. So, to resolve Courser's argument, it is not enough to say this particular conversation between him and Allard allegedly never happened.[8]

In conclusion, Courser is entitled to neither legislative immunity nor an evidentiary privilege under the Speech or Debate Clause. Because the trial court properly denied Courser's legislative-immunity and evidentiary-privilege claims, we do not address the remainder of his arguments on appeal.

Affirmed.

BECKERING, P.J., and RIORDAN, J., concurred with CAMERON, J.

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[8] We note that Allard testified to Courser's motive for introducing the bills, i.e., that he wanted to submit the legislation before another representative. Courser does not raise this point, but testimony regarding his motive for introducing the bills is a matter squarely protected by the Speech or Debate Clause. See *Johnson*, 383 US at 184-186.

In re BLAKEMAN, MINORS

Docket No. 341826. Submitted October 9, 2018, at Lansing. Decided October 25, 2018, at 9:05 a.m.

The Department of Health and Human Services (DHHS) filed a child protective petition in the Ingham Circuit Court, Family Division, against respondent, the father of four children, on the basis of allegations that he had severely injured a young toddler whom his wife was babysitting. At an adjudicative bench trial conducted by Judge Richard J. Garcia, respondent was informed of his constitutional right against self-incrimination, but he chose to testify and maintained his innocence, claiming that he did not know how the toddler in his care had sustained the injuries. At the close of the trial, the court found that respondent had fractured the toddler's skull, concluded that the court had jurisdiction over the children, and ordered respondent to leave the family home and have no contact with his children other than supervised visits. Respondent then began a court-ordered service plan designed to prepare him to move back into the family home and have unsupervised visitation with his children. The court conducted several dispositional review hearings at which DHHS recommended that respondent be allowed to return home; however, in each instance, the court continued to order that respondent remain excluded from the family home on the ground that respondent had not taken responsibility for having injured the toddler and therefore could not have benefitted from the therapy and other court-ordered services he had received. Respondent filed a delayed application for interlocutory appeal, arguing that the court's insistence that respondent admit his guilt for having caused the toddler's injuries as a condition of reunification with his children violated his constitutional right to be free from compelled self-incrimination. The Court of Appeals granted the application.

The Court of Appeals *held*:

1. The trial court violated respondent's constitutional right against self-incrimination by requiring him to confess to an act of criminal child abuse as a condition of reunification with his children. The Fifth Amendment of the United States Constitution

and Article 1, § 17 of the Michigan Constitution provide that no person shall be compelled in any criminal case to be a witness against himself or herself. This constitutional protection applies in any situation in which a criminal prosecution might follow, regardless of how likely or unlikely that outcome may seem. The privilege against self-incrimination can be claimed in any type of proceeding, and any testimony having even a possible tendency to incriminate is protected against compelled disclosure. Because an inculpatory statement by respondent could be used against him in the future by the Ingham County prosecutor, respondent was afforded the constitutional protections against self-incrimination throughout the child protective proceedings. A constitutional violation of the right against self-incrimination occurs when there is compulsion—i.e., evidence that one is unable to remain silent unless one chooses to speak in the unfettered exercise of one's own will—that is grounded on a penalty exacted for the refusal to testify. In this case, there was a sufficient showing of compulsion at the dispositional review hearing given that the trial court conditioned family reunification on respondent's admitting that he had committed child abuse, which resulted in respondent's having to choose between his liberty interests or his children. There was also a penalty exacted on respondent for refusing to admit to the crime sufficient to compel self-incrimination: he was ordered to remain outside the family home, was granted only supervised visiting time, and was informed by the government that he most likely faced the future termination of his parental rights to his four children. The Michigan Supreme Court and the United States Supreme Court have held that a threatened loss of continued municipal employment, eligibility for public contracting, or professional standing is a severe enough penalty that a constitutional violation arises when it is imposed as a consequence of failing to waive one's right against compelled self-incrimination. If these employment-related concerns may not be used to condition the waiver of one's right against self-incrimination, neither should one's parental rights. On remand, the trial court was directed to decide anew the questions of visitation and whether to allow respondent to return to his family home, taking into consideration all the facts and circumstances while refraining from considering respondent's persistent claim of innocence in connection with the toddler and also while complying fully with the requirements of MCL 712A.19(6).

2. A county prosecutor may acquire standing in a child protective proceeding in three ways: (1) the prosecutor appears when requested by the court, (2) the prosecutor appears when requested by DHHS to act as a legal consultant, or (3) the

prosecutor filed an original petition for termination of parental rights. In this case, the original and amended petitions were filed by a DHHS worker, not the prosecutor, and there was no indication that the trial court requested the prosecutor's appearance. Thus, the prosecutor's only basis for standing would be if DHHS had requested the prosecutor's representation as a legal consultant pursuant to MCR 3.914. Considering the fact that the prosecutor and DHHS strongly disagree about whether reunification should occur, as well as the prosecutor's express declaration that her office was not representing DHHS, the trial court was directed to determine on remand whether the prosecutor has standing to be heard during the remainder of the proceedings.

Order vacated; case remanded for further proceedings.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — CONSTITUTIONAL LAW — RIGHT AGAINST SELF-INCRIMINATION.

A court may not require a respondent in a child protective proceeding to confess to an act of criminal child abuse as a condition of reunification with his or her children (US Const, Am V; Const 1963, art 1, § 17; MCL 712A.1 *et seq*.).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Carol A. Siemon*, Prosecuting Attorney, *Joseph B. Finnerty*, Appellate Division Unit Chief, and *Elizabeth L. Allen*, Assistant Prosecuting Attorney, for the people.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for respondent.

Before: BECKERING, P.J., and RIORDAN and CAMERON, JJ.

CAMERON, J. In this interlocutory appeal from a child protective hearing, respondent-father appeals[1] a dispositional order that prohibits him from residing in the family home with his wife and four children. Respondent came under the jurisdiction of the court for

[1] See *In re Blakeman Minors*, unpublished order of the Court of Appeals, entered February 7, 2018 (Docket No. 341826).

assaulting an unrelated toddler for whom his wife was babysitting. After respondent completed court-ordered services, petitioner, the Department of Health and Human Services (DHHS), had recommended to the trial court over the course of a year that respondent be allowed to return to the home. The assistant prosecuting attorney (APA) representing DHHS disagreed and urged the trial court to continue only supervised visitation. The trial court repeatedly denied DHHS' requests for reunification, concluding that respondent's failure to accept responsibility for assaulting the toddler precluded him from returning to the family home and having unsupervised visitation with his children. On appeal, respondent argues that the trial court violated his Fifth Amendment right against self-incrimination when it conditioned reunification on respondent's admission to abusing an unrelated toddler. We agree that the trial court committed error and, therefore, vacate and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent and his wife have four children. On occasion, respondent's wife would babysit an unrelated toddler. In November 2016, the toddler suffered a seizure, and thereafter often screamed and cried while he was in respondent's home. On February 9, 2017, respondent's wife was babysitting the toddler. Late in the afternoon, respondent's wife left to pick up food for dinner, leaving the toddler with respondent. When respondent's wife returned, the toddler was unresponsive. Respondent's wife called 911, and the emergency responders believed the toddler suffered a seizure. The toddler was transported to the hospital where the physicians discovered a large, life-threatening skull fracture. The physicians determined that the fracture

was nonaccidental and occurred close to the time the toddler was admitted to the hospital. The toddler survived the fracture, but his physician expects significant long-term physical and cognitive deficits.

The day after the toddler was taken to the hospital, DHHS filed a child protective petition against both respondent and his wife. The trial court authorized the petition but allowed the four children to stay with their parents in the home. However, after a custody review hearing, the trial court removed the children from the family home and authorized supervised parenting time. The parents then requested an additional custody review hearing. The trial court held the additional custody review hearing and released the children to the parents.

DHHS filed a second, final amended petition on April 7, 2017. DHHS did not seek termination of petitioner's parental rights, but instead requested that the children be temporarily removed from the home.

In June 2017, the trial court held a multiday adjudicative bench trial. At the trial, respondent was informed of his right against self-incrimination, but he chose to waive that right and testified. Respondent maintained his innocence throughout the examination, claiming he did not know how the toddler sustained the skull fracture. At the close of the trial, the trial court found that respondent fractured the toddler's skull, concluded that the court had jurisdiction over the children, and ordered respondent to leave the family home and have no contact with his children other than supervised visits. As to respondent's wife, the trial court found that she was not responsible for the toddler's injuries and was thus a nonrespondent.

Respondent then began a court-ordered service plan designed to address his issues and to allow him to

move back into the family home and have unsupervised visitation with his children. In late June 2017, respondent began weekly counseling sessions with a therapist. Shortly thereafter, he had a psychological evaluation. The evaluator noted that respondent may have passive-aggressive traits and other related traits such as "a pattern of passive resistance, opposition, stubbornness, failure to engage in direct communication, blaming others, feigning compliance, and a negative disposition." The evaluator stated that there was no information to assess whether respondent had fractured the toddler's skull, but noted that there were no reports that he had ever abused his own children. The evaluator concluded, "This clinician cannot reflect on any compelling reasons why [respondent] should not be able to return home."

In July 2017, a dispositional review hearing was held, and a DHHS foster-care worker updated the trial court on respondent's progress. According to her, the only barrier to respondent's return to the family home was the completion of court-ordered services. By this time, respondent had completed a psychological evaluation, a counselor had been assigned, and respondent was scheduled to begin trauma-based therapy and a parenting class, and respondent was made aware that additional services could be added depending on the results of his psychological evaluation. The parties all agreed, including the APA, that respondent "appear[ed] to be off to a compliant start." However, before setting the date for the next dispositional hearing, the trial court expressed doubt that the outstanding psychological report, or any other evidence for that matter, could support reunification:

> I don't know a good way forward, quite honestly, because the findings that I was required to make by the evidence

> that was presented was that, [respondent] brutally beat another child. . . . So, it's going to take a lot for me to be convinced that he ought to have any unsupervised time with his children, or any other children, quite honestly, because of the nature of the beating, and what occurred to this other boy. . . . And so—and I don't know what treat—I don't know what treatment there is.

In September 2017, DHHS submitted a written report to the trial court to be considered before the next dispositional review hearing. In the report, DHHS indicated that respondent and his wife had been cooperative and that their four children were doing well, although some of the children were having adjustment issues relating to respondent's removal from the family home. The supervisor of the parental visits reported no concerns and indicated that respondent was "fully engaged and interacts well with the children." DHHS recommended that the trial court maintain jurisdiction and that respondent be permitted to return to reside in the family home without supervised visitation.

In October 2017, the trial court held another dispositional review hearing. At that hearing, the DHHS foster-care worker reiterated that there were no concerns about respondent returning to his family while continuing his private counseling. After testimony concluded, the APA stated he was "[not] comfortable endorsing the suggestion of foster care, that—that dad go home at this time" because he was concerned that the severity of the toddler's injuries, coupled with the psychological report, raised "a lot of red flags" and there was no written evidence to suggest "that those red flags [were] being addressed in therapy." Respondent's attorney responded that his client had complied with all court ordered services and that he was "not sure what else we need to do to get [respondent] back in the home." The trial court rejected DHHS' reunifi-

cation recommendation and expressed dissatisfaction "with how this has been overseen by the [DHHS] caseworker." The trial court ordered respondent's therapist to appear at the next dispositional review hearing to explain her recommendation that respondent be allowed to return back to the home. Further, the trial court expressed disbelief that the therapist and DHHS were recommending reunification when respondent had not even admitted to his therapist that he assaulted the toddler:

> And, you know, ten therapy sessions later, don't [sic] change the fact—especially in a situation where this—the—the father is not, he's not taking any responsibility for any of this. Matter of fact, it's everybody else's fault. It's not his fault. So how do you change your behavior? *How do you have insight without any acknowledgment that you did anything wrong*?
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> . . . The ten therapy sessions have done no good. There's no more insight. [Emphasis added.]

The trial court then questioned whether the therapist even considered how respondent's claim of innocence might interfere with respondent's therapy: "There's no indication the therapist had analyzed anything in terms of his responses to the types of things there [sic] working on. Whether he's taking accountability, responsibility, and he knows what things and tools he needs to do to change his behavior." The trial court concluded the hearing, stating: "The fact[] in this case is that [respondent] fractured the skull of a young, special needs child. And he's staying out of the house because I'm not having him do that again."

Before a December dispositional review hearing, DHHS provided the trial court with an updated dispositional review report, stating that there were no safety concerns during respondent's supervised visits

with his children and that he had "exhibited positive communication, appropriate discipline techniques, and positive parenting techniques." DHHS reiterated its recommendation that respondent be allowed to return to the family home. Respondent's court-ordered therapist, Cynthia Swartz, also submitted a letter to the trial court affirming respondent's progress and explaining that respondent's primary diagnosis was Adjustment Disorder. She stated that respondent had been cooperative and concluded her letter by stating, "In summary, I would echo [the psychological evaluator's] recommendation by saying that I can find no compelling reason why [respondent] should not be able to return home; and in fact, suggest that his absence has become a hardship for his family."

At the December 2017 dispositional review hearing, Swartz and the DHHS foster-care worker defended their recommendation to allow respondent's return to the family home. The APA challenged both Swartz and the DHHS worker regarding their recommendations. The DHHS worker acknowledged to the court that the toddler's injuries were serious and that the trial court had concluded that respondent was found legally responsible for those injuries. She further acknowledged that respondent had not admitted to injuring the toddler. The APA then questioned the DHHS worker as to how she could recommend respondent's return to the family home under those circumstances. The DHHS worker explained that respondent was working toward addressing any anger, parenting, or other underlying issues, and neither DHHS nor Swartz had identified any safety concerns that should prevent respondent from returning home and continuing DHHS services.

During the APA's brief cross-examination, Swartz also was pressed about whether respondent had made

any admissions during his therapy sessions and how she could conclude that respondent was benefiting from counseling if "we haven't identified that he did anything wrong." Like the DHHS worker, Swartz acknowledged that respondent had not admitted responsibility for the toddler's injuries. The trial court then interrupted questioning and the following exchange occurred:

> *The Court*: Generally when I benefit from therapy it's because I recognize that there's something that I've done wrong or something that I'm not doing appropriately or something that I need to improve upon and then I focus on those things and I act accordingly and change my behavior. Is that the purpose of therapy?
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> [*Swartz*]: Sure. I would say how to handle things in life that are not going the way you maybe expected that they would go.
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> *The Court*: Right, like a kid crying all day.
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> [*Swartz*]: Sure.
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> *The Court*: All right. The outcome for him under this court's ruling on medical information, trial that I held, indicates that he handled that in a brief moment in time by giving this kid a skull fracture. How that happened I don't know. I just know that he did it, that's what I conclude, all right? So, given that reality . . . , without acknowledging your responsibility for that behavior, how are you going to avoid engaging in that behavior in the future if you don't acknowledge that you did something wrong?
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> [*Swartz*]: Do you want me to give you my hypothesis on this? . . . [W]e have not talked about [the toddler]. So, what I have observed however is deep empathy and understanding love, engagement with his own children and, you know, a desire to be a good parent for them. So, I feel like that, along with the history of his parenting with his children is an indication that he would continue in that way.

> *The Court*: I find it to be rather shocking, quite honestly, that [the toddler] hasn't been talked about.
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> [*Swartz*]: We've talked about it in the terms of his—he claims that that was not the case and, you know, if you like excuses but you were wrong in that—
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> *The Court*: Right.
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> [*Swartz*]: —so, yeah, and there is empathy for the injury for [the toddler] but no . . . admission that he did it. I've been doing it long enough that I feel like our relationship is good enough that if there was an admission to that, he would have said that to me but . . . I'm not a mind reader and I can't say whatever but—so I think from his perspective . . . the frustration is having been accused of something that he didn't do and how do you deal with that . . . and show that he is a good parent and be trusted with his children.

At the close of the hearing, the children's lawyer-guardian ad litem (LGAL) stated that she had changed her position and that respondent should not return to the home. The APA, despite the DHHS recommendation, also argued that respondent should not be allowed to return home. In response, respondent's counsel argued that the trial court should allow respondent to return home and raised the following concern:

> [I]t's problematic to be asking a parent to incriminate himself in order to allow him to get his kids back in his care because then we're just inviting I guess criminal charges. So . . . I think that's a legal issue and certainly [respondent] at least would not be advised by me to make such an admission, at least at this point in time.

The trial court then summarized its ruling as follows:

> I didn't sit through a trial for no reason. I didn't make these findings for no reason. I haven't heard anything that would change the court's conclusion. . . . [W]hether or not your client has legal implications from addressing what I

consider him to be in denial about—that's of no import to me. It doesn't matter to me whether you, you know, parents come to court many times and say your Honor I'm going to assert my [F]ifth [A]mendment rights against self-incrimination because I don't want to testify because, ah, I'm under threat of criminal prosecution. Well, that's a choice. In that instance you've chosen your liberty interest over your children's. That's a choice that parents make. . . . So, again, I hate to be the, you know, the immovable object but I concluded that based on his injuries and based upon the window of time that this child was at in [respondent's] care, that that injury occurred while the child was in his care alone. I came to that conclusion, that's a finding. *The therapist doesn't trust my finding apparently based upon the work she's had with him*. [*Respondent*] *doesn't believe—he denies that that happened, I found that it did*. *And to go on like as if nothing happened, I am absolutely astounded that the state would take that position*. . . . *Why file this petition in the first instance? I am astounded that the State of Michigan has taken that position*. Well, you know, he seems like a good dad to me, we just let him back in the house and, you know, he's had a psychological evaluation, he's talked to a therapist for a while and yeah, you might have found that he crushed this kid, broke this kid's skull but that's, you know, he's not—that's neither here nor there, we're just going to proceed according[ly].

. . . [N]othing has changed. He and his therapist are not even talking about [the toddler]. It's not even coming up in discussion. So we're living in this other world where he didn't do anything wrong and he's just trying to be a better dad and husband.

* * *

. . . So my reality is much different than everybody else's reality except for [the prosecutor] and now [the LGAL]. Everyone's reality is different than mine but these children are my court wards. . . . [S]omehow the [c]ourt has gotten it wrong and . . . he's been able to convince

everybody that he's a good guy and the kids miss him, we're just going to forget about [the toddler] and what he did to him. That's not how it works, folk[s].

So, I have to make decisions based upon my reality, the reality of this case. The reality of this case is that [respondent] had a frustration, anger, whatever it is that was working, he caused a skull fracture to the young man who had to be rushed to the hospital. . . . So, the Court made that finding.

[N]othing I heard today pushes the ball forward. I'm affirming the prior orders.

* * *

. . . Unless something changes, I can't tell you that I'm going to change. [Emphasis added.]

The trial court entered its order following the dispositional review hearing, continuing its directive that respondent not live in the home and only have supervised contact with the children.[2]

[2] Since the filing of this interlocutory appeal, the APA and trial court have relied on respondent's failure to admit guilt as evidence that respondent could not have made progress toward reunification as DHHS has reported. Indeed, at a dispositional review hearing in February 2018, the APA asked the DHHS caseworker, "Why are we giving [respondent] [anger management] services if he hasn't recognized that he has an anger problem?" Further, because respondent had not made a "breakthrough" in acknowledging his abuse of the toddler, the APA has opined that the case would likely result in the "permanent wardship" of the children. In that same hearing, the trial court's justification for continuing only supervised visitation was that "additional counseling is required to address the acceptance of responsibility for the behavior that led to the injury to the minor child . . . in order for [respondent] to fully benefit from the services that are being provided to him."

At the most recent dispositional review hearing in August 2018, the DHHS worker informed the trial court that respondent completed all services, and therefore, unsupervised parenting time was recommended. At the conclusion of the hearing, the APA again argued against unsupervised parenting time, stating that "our only options are a full

On appeal, we must answer a constitutional question of first impression, which is whether a parent's constitutional right against compelled self-incrimination bars a court in child protective proceedings from requiring that parent, as a condition of reunification, to admit to having abused an unrelated child. We conclude that it does, and therefore, vacation and remand is required.

II. STANDARD OF REVIEW

Dispositional orders entered after a court assumes jurisdiction over a child "are afforded considerable deference on appellate review[.]" *In re Sanders*, 495 Mich 394, 406; 852 NW2d 524 (2014). A trial court's dispositional order is reviewed for clear error. *Id*. This Court reviews constitutional questions de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006); *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). Similarly, "[w]hether a party has been afforded due process is a question of law, subject to review de novo." *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

III. ANALYSIS

Respondent argues that, by requiring him to confess to an act of criminal child abuse as a condition of reunification with his children, the trial court violated his Fifth Amendment right against compelled self-incrimination. We agree.

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custody order in mom, a release of parental rights by dad[,] or termination of parental rights by dad." The trial court scheduled another dispositional review hearing date, stating: "I disagree with the assessment of the case. . . . I'm not satisfied based on what's been reported to the [c]ourt. I [don't] have any degree of confidence in [respondent's] ability to provide care without supervision." No further services have been recommended for respondent.

The rights recognized by the Fifth Amendment of the United States Constitution include the guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V. This provision applies to the states through operation of the Fourteenth Amendment, *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996) (opinion by BOYLE, J.), citing *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964), and appears verbatim in the Michigan Constitution, Const 1963, art 1, § 17.

The constitutional protection is worded as one applicable to criminal cases, and thus it applies in any situation in which a criminal prosecution might follow, regardless of how likely or unlikely that outcome may seem. See *United States v Miranti*, 253 F2d 135, 139 (CA 2, 1958) ("We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute."). Accordingly, "[t]he privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *People v Ferency*, 133 Mich App 526, 533; 351 NW2d 225 (1984), quoting *In re Gault*, 387 US 1, 47; 87 S Ct 1428; 18 L Ed 2d 527 (1967) (quotation marks and citation omitted). Any testimony "having even a possible tendency to incriminate is protected against compelled disclosure." *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). The privilege may be invoked when criminal proceedings have not been instituted or even planned. *People v Guy*, 121 Mich App 592, 609-610; 329 NW2d 435 (1982). Here, although respondent has not been charged for assaulting the toddler, we can reasonably conclude that an inculpatory statement by respondent

could be used in the future by the Ingham County prosecutor, and therefore, respondent is afforded the protections of the Fifth Amendment throughout the child protective proceedings.

We acknowledge that the trial court did not demand a confession from respondent, but it instead refused to allow respondent an opportunity to return to the family home if he did not admit responsibility for the toddler's injuries to his therapist as part of his services. Any such admission to his therapist would not be privileged against disclosure in this child protective proceeding. See MCL 722.631 (abrogating privileges in communications other than those between attorney and client, or priest and penitent, in child protective proceedings).

The privilege against self-incrimination permits a defendant to refuse to answer official questions in any other proceeding, no matter how formal or informal, if the answer may incriminate him or her in future criminal proceedings. *Philips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995). Our courts have seldom addressed the Fifth Amendment right against self-incrimination in the context of child protective proceedings. In *In re Stricklin*, 148 Mich App 659, 662-663; 384 NW2d 833 (1986),[3] the parents argued that the trial court violated their rights against compelled self-incrimination when it refused to adjourn the child protective proceedings pending the outcome of the criminal proceedings against them. In that case, this Court recognized two interrelated requirements for a Fifth Amendment violation: compulsion, i.e., evidence that "a person is unable 'to remain silent

[3] We acknowledge that Court of Appeals decisions before November 1, 1990, are not binding. MCR 7.215(J)(1). However, *In re Stricklin* has not been overruled or modified, and we see no reason to depart from it now.

unless he chooses to speak in the unfettered exercise of his own will,' " that is grounded on a penalty exacted for a refusal to testify. *Id*. at 663-664, quoting *Malloy*, 378 US at 8. The question in *In re Stricklin* was "whether a penalty was exacted for appellants' refusal to testify [at child protective proceedings], sufficient to amount to the kind of compulsion contemplated by the Fifth Amendment." *Id*. at 664. According to the appellants, "compulsion was present in the case at bar because the specter of losing their parental rights was held over their heads if they chose not to testify." *Id*.[4] This Court disagreed, noting that for "a Fifth Amendment violation, the testimony offered at the criminal proceeding would have had to have been incriminating." *Id*. However, any testimony proffered at a proceeding in the child protective case would have been "nonincriminating," *id*. at 665, and therefore, "[t]he choice not to testify was no more than appellants' tactical decision as to the best course to follow through the probate and criminal proceedings," *id*. at 666.

Here, unlike in *In re Stricklin*, respondent waived his Fifth Amendment right against self-incrimination at the adjudicative bench trial. He provided "nonincriminating" testimony, claiming he did not injure the toddler and believed that any injury resulted from a seizure. At the close of trial, the trial court found by a preponderance of the evidence that respondent caused the injuries to the toddler. At a later dispositional review hearing, the trial court gave respondent a

[4] Importantly, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." *Phillips*, 213 Mich App at 400, citing *Baxter v Palmigiano*, 425 US 308, 318; 96 S Ct 1551; 47 L Ed 2d 810 (1976).

Hobbesian choice[5] to either (1) retract his claim of innocence, admit to the child abuse at therapy as a condition of completing services, and expose himself to criminal liability for child abuse, or (2) maintain his innocence, which would likely result in the termination of his parental rights to his four children. Even though respondent initially waived his Fifth Amendment right to remain silent,[6] there was a sufficient showing of compulsion at the dispositional review hearing. "The compulsion of *nonincriminating* testimony is not the sort of compulsion contemplated by the Fifth Amendment." *Id*. at 665 (emphasis added). The trial court, however, conditioned reunification on an admission of guilt to the child abuse. We see no reason to conclude that there is a lack of compulsion simply because respondent initially waived his Fifth Amendment right, testified at the trial, and was then later compelled to retract his claim of innocence and incriminate himself. Compulsion occurs "when a person is unable 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'." *Id*. at 664, quoting *Malloy*, 378 US at 8. As the trial court explained, respondent had a choice between his liberty interests and his children. Respondent chose the former, but any

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[5] A Hobbesian choice, derived from the theories of political philosopher Thomas Hobbes, is commonly known as a choice between two equally unacceptable alternatives. This is not to be confused with a Hobson's choice—a "take it or leave it" situation—which originated from Thomas Hobson, a seventeenth century liveryman who offered every customer the choice of taking the horse nearest the door or none at all. See *Merriam-Webster's Collegiate Dictionary* (11th ed).

[6] Voluntary testimony given in one proceeding does not constitute a waiver of the Fifth Amendment privilege against self-incrimination in a subsequent proceeding. See *People v Hunley*, 63 Mich App 97, 101; 234 NW2d 169 (1975) (stating that a "[d]efendant's decision to testify at the preliminary examination does not prevent the defendant from asserting his Fifth Amendment right not to testify at trial") (quotation marks and citation omitted).

right to remain silent was no longer unfettered, and there was sufficient compulsion "to be a witness against himself." US Const, Am V.

Turning to the second *Stricklin* requirement, there must be a penalty exacted on respondent for refusing to admit to the crime sufficient to compel self-incrimination. In this case, that penalty was obvious. Because respondent would not incriminate himself and admit to the child abuse, he was ordered to remain outside the family home, was granted only supervised visiting time, and was informed by the government that he most likely faces the future termination of his parental rights to his four children. Therefore, unlike in *In re Stricklin*, respondent was given an extreme and detrimental choice—admit to the child abuse at therapy, which could be used in future criminal proceedings—or continue to be separated from his children and eventually lose his parental rights. This was a severe penalty threatened and, therefore, a violation of respondent's Fifth Amendment right against compelled self-incrimination.

The circumstances underlying the instant case square with the plurality decision in *McKune v Lile*, 536 US 24; 122 S Ct 2017; 153 L Ed 2d 47 (2002). In *McKune*, the United States Supreme Court decided whether participation in Kansas's Sex Abuse Treatment Program (SATP) violated an inmate's right against compelled self-incrimination. *Id*. at 29-30.

> As part of the program, participating inmates are required to complete and sign an "Admission of Responsibility" form, in which they discuss and accept responsibility for the crime for which they have been sentenced. Participating inmates also are required to complete a sexual history form, which details all prior sexual activities, regardless of whether such activities constitute uncharged criminal

> offenses. A polygraph examination is used to verify the accuracy and completeness of the offender's sexual history. [*Id*. at 30.]

The Court acknowledged that any information provided as part of the SATP was not privileged and would "leave[] open the possibility that new evidence might be used against sex offenders in future criminal proceedings." *Id*. Choosing not to participate in the program automatically resulted in the reduction of "privilege status," which included a reduction in "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, [and] access to a personal television" and would also result in a "transfer[] to a maximum-security unit." *Id*. at 30-31.

The defendant refused to participate in the program and filed an action, claiming that the requirements of the SATP violated his Fifth Amendment right against compelled self-incrimination. *Id*. at 31. The issue before the United States Supreme Court was "whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right." *Id*. at 35. With a showing of compulsion, Kansas could no longer "continue the program in its present form . . . ." *Id*. The Court in *McKune*, however, determined that "[t]he consequences in question . . . are not ones that compel a prisoner to speak about his past crimes despite a desire to remain silent." *Id*. at 36. The consequences in this case—a loss of one's constitutional right to provide care for one's children, see *In re Sanders*, 495 Mich 394, 422; 852 NW2d 524 (2014)—were far greater than the consequences that the defendant faced in *McKune*.

Our Supreme Court and the United States Supreme Court have held that a constitutional violation arises when a person is subject to a severe consequence

unless he or she waives the Fifth Amendment right against compelled self-incrimination. A concurrence in *State Bar Grievance Administrator v Baun*, 395 Mich 28; 232 NW2d 621 (1975), noted that "[t]he United States Supreme Court has limited the collateral consequences or penalties which may be imposed on the [one] claiming the privilege" against self-incrimination. *Id*. at 41 n 9 (LEVIN, J., concurring), citing *Lefkowitz v Turley*, 414 US 70; 94 S Ct 316; 38 L Ed 2d 274 (1973), and *Slochower v Bd of Higher Ed of New York City*, 350 US 551; 76 S Ct 637; 100 L Ed 692 (1956). In *Lefkowitz*, the state "sought to interrogate [the] appellees about their transactions with the State and to require them to furnish possibly incriminating testimony by demanding that they waive their [Fifth Amendment] immunity and by disqualifying them as public contractors when they refused." *Lefkowitz*, 414 US at 82. The United States Supreme Court disapproved of that tactic, holding that "[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary." *Id*. at 82-83. In *Slochower*, the Court disapproved, on due-process grounds, of a provision of the Charter of the City of New York that arbitrarily conditioned continued municipal employment on employees' waiving their right against self-incrimination whenever asked a question relating to official conduct. *Id*. at 552, 556, 559. As part of its reasoning, the Court noted that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing," and thus that the right against self-incrimination "serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id*. at 557-558. In *Spevack v Klein*, 385 US 511, 516; 87 S Ct 625; 17 L Ed 2d 574 (1967), the Court held that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of

livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege."

The preservation of one's parental rights presents an imperative at least as great as continued municipal employment, eligibility for public contracting, and maintenance of one's professional license, and if the latter may not be used to condition the waiver of one's right against self-incrimination, neither should one's parental rights. By requiring respondent to confess to the criminal abuse of the toddler in order to regain care and custody of his children, the trial court was requiring an inculpatory admission against respondent's penal interests. This could also be self-defeating because such an admission may lead to criminal charges that end with respondent being taken away from his children for incarceration. This practice offends due process when a respondent is required, on pain of being deprived of the care and custody of his children, to confirm the trial court's determination that he had committed severe child abuse. Even more, requiring respondent to admit to the child abuse after he had already testified at trial and denied any wrongdoing would subject him to possible perjury charges. The record clearly shows that the trial court violated respondent's Fifth Amendment right against self-incrimination when it conditioned unsupervised visitation and eventual reunification on respondent's admission to the child abuse.

With that said, this Court has the difficult task of providing guidance to the trial court in light of this constitutional violation. "[A]t each review hearing, the court is required to consider, among other things, '[c]ompliance with the case service plan with respect to services provided or offered to the child and the child's

parent, . . . whether the parent . . . has complied with and benefited from those services,' and '[t]he extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency.' " *In re Mason*, 486 Mich 142, 156; 782 NW2d 747 (2010), quoting MCL 712A.19(6)(a) and (c) (ellipses in *Mason*). The trial court must also take into account the likely harm to the children if they continue to be separated from respondent, MCL 712A.19(6)(d), as well as the likely harm to the children if they are returned to their parent's care, MCL 712A.19(6)(e). We remand this case to the trial court for a balancing of imperatives, and we instruct the trial court to decide anew the questions of visitation and whether to allow respondent to return to his family home, taking into consideration all the facts and circumstances while refraining from considering respondent's persistent claim of innocence in connection with the toddler. In doing so, the trial court must ensure that it is complying fully with the requirements of MCL 712A.19(6).[7]

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[7] While not raised on appeal, we believe it is important for the trial court to address whether the prosecutor has standing to proceed in this case. There are three avenues through which a county prosecutor acquires standing in a child protective proceeding: (1) the prosecutor appears when requested by the court, (2) the prosecutor appears when requested by the family independence agency—now DHHS, see Executive Order No. 2004-38—to act as a "legal consultant," or (3) the prosecutor has filed an original petition for termination of parental rights. *In re Jagers*, 224 Mich App 359, 363-364; 568 NW2d 837 (1997), citing MCL 712A.17(4) and (5) and MCL 712A.19b(1); see also *In re Hill*, 206 Mich App 689, 691-692; 522 NW2d 914 (1994).

Here, the original and amended petitions were filed by a DHHS worker—not the prosecutor—and there is no indication that the trial court requested the prosecutor's appearance. Thus, it appears the prosecutor's only basis for standing is if the DHHS had requested the prosecutor's representation as a "legal consultant." On appeal, the prosecutor has unequivocally denied representing DHHS "as a client."

Vacated and remanded. We do not retain jurisdiction.

BECKERING, P.J., and RIORDAN, J., concurred with CAMERON, J.

Instead, the prosecutor asserted that her office appears at child protective proceedings only "as a legal consultant pursuant to MCR 3.914 . . . ."

MCR 3.914(C)(1) states: "On request of the Michigan Family Independence Agency or of an agent under contract with the agency, the prosecuting attorney shall serve as a *legal consultant* to the agency or agent at all stages of a child protective proceeding." With that said, "the agency may retain legal representation of its choice when the prosecuting attorney does not *appear on behalf of the agency* or an agent under contract with the agency." MCR 3.914(C)(2) (emphasis added). MCR 3.914 does not define a "legal consultant." However, Subsection (C)(2) indicates that a prosecutor appears "on behalf of the agency." This potential issue has surfaced because the prosecutor and DHHS strongly disagree about whether reunification should occur. Considering the prosecutor's express declaration that her office is not representing DHHS, the trial court should determine on remand whether the prosecutor has standing to be heard during the remainder of the proceedings.

PEOPLE v McKEWEN

Docket No. 339068. Submitted July 12, 2018, at Lansing. Decided October 25, 2018, at 9:05 a.m. Leave to appeal sought.

Benjamin K. McKewen was convicted following a jury trial in the Isabella Circuit Court of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a), and felonious assault, MCL 750.82, in connection with an altercation that occurred between defendant and the complainant at a party. During the argument, the complainant fell to the ground after he and defendant pushed or punched each other. Although there was no glass or sharp object on the ground where he fell, the complainant was bleeding profusely from his chest when he stood up. No witnesses saw defendant holding a knife—which medical providers opined was the cause of the complainant's injury—but one witness testified that defendant held his right hand behind his back as if trying to conceal something and that defendant continued to conceal his right hand from view as he walked away. In addition, various witnesses testified that defendant either pushed or punched the complainant in the chest during the fight. Defendant moved for a directed verdict, arguing that there was insufficient evidence to support the charged offenses given the lack of evidence that he possessed a knife. The court, Paul H. Chamberlain, J., denied the motion, and the jury convicted defendant as charged. Defendant appealed.

The Court of Appeals *held*:

1. Given that (1) the emergency room physician and the surgeon each opined that the complainant's wound was caused by a knife, (2) a witness testified that she saw defendant hit the complainant in the chest, and (3) a witness testified that defendant held his right hand behind his back after the altercation and appeared to be concealing something as he left the scene, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that defendant stabbed the complainant in the chest with a knife. Accordingly, there was sufficient evidence for the jury to conclude that defendant assaulted the complainant with a dangerous weapon and that he did so with the intent to cause great bodily harm less than murder.

2. MRE 702 establishes the requirements for the admission of expert testimony. Before admitting expert testimony under MRE 702, a trial court must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case. Unlike MCL 600.2169, which governs a witness's qualifications for testifying about the standard of care in a medical malpractice case, MRE 702 does not require that a medical expert be board certified in a particular specialty—like forensic pathology—before offering expert testimony. Similarly, the rule does not require a medical expert to have devoted a majority of his or her practice to a given specialty before being qualified to offer expert testimony. In this case, the trial court did not abuse its discretion by ruling that Dr. Daniel Meldrum's training, education, and experience qualified him as an expert in determining the nature of the complainant's wound. Meldrum found no glass particles in the wound, and he ruled out other potential explanations for the wound through differential diagnosis, a well-recognized scientific process. Accordingly, the trial court did not abuse its discretion by concluding that Meldrum's opinion testimony was based on reliable data, principles, and methodologies.

3. MCL 750.84(1)(a) provides that a person who assaults another with intent to do great bodily harm less than murder is guilty of a felony. In contrast, MCL 750.82(1) provides that a person is guilty of felonious assault if the person assaults another person with a dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder; the lack of intent to do great bodily harm less than murder is a negative element that the prosecution does not have to prove beyond a reasonable doubt. Juries are not held to any rules of logic, and they are not required to explain their decision. Because courts do not know how jurors reach their decision, whether through compassion or compromise, a jury has the power to release a defendant from some of the consequences of his or her actions. In that regard, when a defendant is charged with compound felonies and the jury is instructed on the elements of both offenses, the jury may choose to enter inconsistent verdicts because it has the power to be lenient even though, from the instructions, it is aware that conviction of the compound felony is logically inconsistent with acquittal of the predicate felony. When a defendant is charged only with felonious assault, it is of no consequence that the jury is not instructed on the negative element (i.e., the absence of an intent to do great bodily harm less than murder).

But when a defendant is charged with both felonious assault and AWIGBH in connection with a single assault, the lack of instruction on the negative element of felonious assault deprives the jury of the knowledge that its verdicts are inconsistent. The Court's decision in *People v Davis*, 320 Mich App 484 (2017)—that a judgment of conviction for both AWIGBH and aggravated domestic assault (second offense), MCL 750.81a(3), for a single assault was inconsistent because the crimes were mutually exclusive—controlled the outcome in this case. Specifically, the defendant could not violate both statutes with one act because the defendant could not both intend (AWIGBH) and yet not intend (aggravated domestic assault) to do great bodily harm less than murder. The trial court specifically instructed the jury that to convict defendant of AWIGBH, the jury had to find that he intended to do great bodily harm, and the jury made that determination when it found defendant guilty of AWIGBH. That finding was inconsistent with the statutory definition of felonious assault, and it was therefore necessary to vacate the felonious-assault conviction. *People v Doss*, 406 Mich 90 (1979), did not control the outcome of the case because that case did not address the issue of inconsistent verdicts. Because this case did not involve a compound offense and the instructions did not inform the jury of the negative element in felonious assault, the jury would have concluded that conviction on both offenses was consistent. The verdict was therefore not the result of compromise or leniency because the jury convicted defendant as charged. Although the jury did not know that the convictions were inconsistent, the trial court did, and the appropriate remedy was to vacate the felonious-assault conviction and affirm the AWIGBH conviction. Finally, defendant's convictions for both AWIGBH and felonious assault for a single act did not violate the constitutional double-jeopardy protection against multiple punishments for the same offense because the convictions occurred in a single trial.

4. The trial court did not abuse its discretion when it assessed defendant 10 points for Offense Variable 19 (interference with the administration of justice). Defendant disposed of the weapon he used to stab the complainant, as well as the clothes he wore during the attack, both of which interfered with the police investigation of the crime and in turn interfered with the administration of justice.

Affirmed in part and vacated in part.

GADOLA, J., dissenting, disagreed with the majority that defendant's convictions were inconsistent. The Supreme Court's decision in *Doss*—that negative concepts, such as the absence of an

element, are not treated as positive elements of a crime that the prosecution must prove beyond a reasonable doubt—controlled the outcome of the case. In this case, while the absence of an intent to inflict great bodily harm less than murder was fundamental to felonious assault in a general definitional sense, it was not a positive element that the prosecution had to prove beyond a reasonable doubt (like it was with AWIGBH). This Court's decision in *Davis* was incorrectly decided and fundamentally at odds with the Supreme Court's decision in *Doss*. Although the jury in this case was required to find that defendant acted with the intent to do great bodily harm less than murder with respect to AWIGBH, it was not required to find the absence of such intent with respect to felonious assault. Accordingly, the jury's findings were not contradictory, and the convictions were not mutually exclusive. Judge GADOLA would have affirmed defendant's convictions for both AWIGBH and felonious assault.

1. CRIMINAL LAW — FELONIOUS ASSAULT — INTENT — NEGATIVE ELEMENTS.

Under MCL 750.82(1), a person is guilty of felonious assault if the person assaults another person with a dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder; the absence of an intent to inflict great bodily harm less than murder is a negative element that the prosecution does not have to prove beyond a reasonable doubt.

2. CRIMINAL LAW — JURIES — VERDICTS — MUTUALLY EXCLUSIVE CONVICTIONS.

The offenses of felonious assault, MCL 750.82(1), and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a), are mutually exclusive when the offenses arise from a single assault; a jury may not convict a defendant of both felonious assault and AWIGBH for a single assault because the lack of instruction on the negative element in felonious assault—i.e., the absence of an intent to inflict great bodily harm less than murder—deprives the jury of knowledge that its verdicts are necessarily inconsistent given that intent to do great bodily harm less than murder is an element of AWIGBH.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *David Porter*, Assistant Attorney General, for the people.

F. Mark Hugger for defendant.

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. Following a jury trial, defendant appeals his convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a), and felonious assault, MCL 750.82. The trial court sentenced defendant to concurrent prison terms of 5 to 10 years for the AWIGBH conviction and two to four years for the felonious-assault conviction. For the reasons set forth in this opinion, we affirm defendant's conviction for AWIGBH but vacate his conviction for felonious assault.

I. FACTS

Defendant's convictions arose from an altercation between himself and the complainant, Aristotle Zarkin, at a birthday party. Zarkin confronted defendant after Zarkin's girlfriend told him that defendant's conduct toward her made her feel uncomfortable. According to witnesses, the two pushed or punched each other, after which Zarkin fell to the ground. When he got back up, witnesses noticed that he was bleeding profusely from his chest. Although Zarkin initially thought he had cut himself from landing on a broken shard of glass, witnesses and investigators did not find any glass or other sharp object in the area where Zarkin fell. Medical providers believed that Zarkin received a stab wound to his chest. The object made a clean cut, and it traveled through muscle, fascia, and cartilage and then severed his mammary artery. None of the witnesses to the altercation observed defendant armed with a knife, but a witness testified that after Zarkin fell to the ground, defendant kept his right hand behind his back as if trying to conceal something and that he continued to keep his right hand concealed from view as he walked away after the altercation.

II. ANALYSIS

A. DENIAL OF MOTION FOR DIRECTED VERDICT

On appeal, defendant first argues that the trial court erred by denying his motion for a directed verdict. Defendant argues that the evidence was insufficient to show that he actually possessed a knife and stabbed Zarkin, which in turn rendered the evidence insufficient to support his convictions. We disagree.[1]

Various witnesses testified that after defendant either pushed or punched Zarkin in the chest during the altercation, Zarkin got up from the ground with a chest wound that bled profusely. It is undisputed that none of the witnesses actually saw defendant with a knife. However, an emergency medical technician, who was present at the party and provided assistance after Zarkin was injured, testified that the wound appeared to be a stab wound that was made by something very sharp, narrow, long, and skinny. The emergency room physician, who treated Zarkin at McLaren Hospital, similarly testified that the wound was a stab wound with clean edges made by something sharp and that Zarkin sustained a laceration to his mammary artery.

[1] We review de novo a trial court's decision denying a motion for a directed verdict. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Our task is to review the evidence in the light most favorable to the prosecution to determine whether the essential elements of the charged crimes were proved beyond a reasonable doubt. *People v Schrauben*, 314 Mich App 181, 198; 886 NW2d 173 (2016). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of [a] crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). With regard to an actor's intent, because of the difficulties inherent in "proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Dr. Daniel Meldrum, M.D., a board-certified cardiothoracic and general trauma surgeon who treated Zarkin at Covenant Medical Center, testified on the basis of his observations during the physical examination that Zarkin was stabbed with a knife about three to four inches long, approximately an inch in width, and three to four millimeters thick. Dr. Meldrum also explained that the trajectory of the wound was at an angle from "outside to inside" rather than "straight on," and the trajectory would be "counterintuitive" with falling directly onto glass. One of the eyewitnesses testified that she saw defendant strike Zarkin in the chest, but defendant did not throw a "normal" punch with his knuckles "straight to whatever body part he was hitting." Instead, he struck at Zarkin "sideways" with the thumb and forefinger of his hand using a roundhouse punch.

Although defendant and other witnesses initially thought that defendant had fallen on a piece of glass, witnesses and investigators did not see any large shards of glass or other items on the ground that might have caused Zarkin's injury when he fell. And although none of the witnesses actually saw a knife, a witness testified that after the altercation, defendant held his right hand behind his back and appeared to be trying to conceal something as he argued with bystanders and as he left the scene.

Viewed in a light most favorable to the prosecution, the testimony of the emergency room physician and the surgeon combined with the evidence that defendant was concealing his right hand behind his back following the altercation was sufficient to enable the jury to infer, and to conclude beyond a reasonable doubt, that defendant stabbed Zarkin in the chest with a knife. Thus, the jury could reasonably conclude that defen-

dant's use of a knife to stab Zarkin in the chest proved that he assaulted Zarkin with a dangerous weapon and that he did so with the intent to cause great bodily harm less than murder. *People v Stevens*, 306 Mich App 620, 629; 858 NW2d 98 (2014).

Accordingly, sufficient evidence supports defendant's convictions.

B. EXPERT TESTIMONY

Defendant next argues that the trial court abused its discretion by determining that Dr. Meldrum was qualified to offer his expert opinion that Zarkin's wound was a stab wound from a knife.[2]

The admissibility of expert testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Before admitting expert testimony, a trial court must "ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and method-

[2] We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

ologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012) (opinion by MARY BETH KELLY, J.). In this case, defendant challenges the second and third requirements. He argues that Dr. Meldrum was not qualified to testify as an expert and that his opinion testimony was not based on reliable principles and methods. We disagree.

With respect to the second requirement, the trial court found that Dr. Meldrum was qualified to render an opinion regarding the nature of Zarkin's wound on the basis of his training and decades of experience as a cardiothoracic surgeon, general surgeon, and trauma surgeon. Dr. Meldrum testified about his qualifications and board certifications, including the fact that he is required to address identification of the instrumentality that caused a particular wound as part of a periodic recertification process. Dr. Meldrum also testified that he trained under a preeminent expert in trauma surgery and that he received instruction in distinguishing different types of wounds.

Defendant argues that Dr. Meldrum was not qualified because he did not possess the same qualifications as, for example, a medical examiner. Defendant appears to conflate the qualifications for testifying as an expert under MRE 702 with the requirements of MCL 600.2169, which governs a witness's qualifications for testifying about the standard of care in a medical malpractice case. In contrast to MCL 600.2169, however, nothing in MRE 702 requires that a medical expert be board certified in a particular specialty, such as forensic pathology, or that a medical expert have devoted a majority of his or her practice to a given specialty to be qualified to offer expert testimony. The trial court did not abuse its discretion by ruling that

Dr. Meldrum's training, education, and experience qualified him as an expert in determining the nature of Zarkin's wound.

With respect to the third requirement, the trial court found that Dr. Meldrum's opinion was based on sound scientific principles. The court noted that Dr. Meldrum had investigated other possible causes of the wound. Specifically, he testified that he had checked whether glass or other particles were present in the wound to make sure that no particles were left behind to cause further injury and that he found none. Dr. Meldrum also explained his process of ruling out other potential explanations for Zarkin's wound through differential diagnosis, a well-recognized process. See *Lowery v Enbridge Energy Ltd Partnership*, 500 Mich 1034, 1046 (2017) (MARKMAN, J., concurring).

For these reasons, the trial court did not abuse its discretion by finding that Dr. Meldrum's opinion testimony was based on reliable data, principles, and methodologies and that Dr. Meldrum was qualified to offer his opinion regarding the cause of Zarkin's wound.

C. CHALLENGES TO THE DUAL CONVICTIONS

Defendant raises two arguments challenging his convictions for both AWIGBH and felonious assault arising out of a single incident with one victim. First, defendant argues that his conviction for both offenses for a single act violates the constitutional double-jeopardy protection against multiple punishments for the same offense. However, this argument was rejected by the Supreme Court in *People v Strawther*, 480 Mich 900 (2007), and it was more fully discussed in *People v Wilson*, 496 Mich 91, 102; 852 NW2d 134 (2014), abrogated on other grounds by *Bravo-Fernandez v*

United States, 580 US ___; 137 S Ct 352; 196 L Ed 2d 242 (2016), wherein the Court held that "[t]he very application of the Double Jeopardy Clause necessarily requires more than one trial . . . ." Next, defendant argues that the language of the statutes defining these offenses requires the court to enter a judgment of conviction only as to one of the two offenses for which the jury convicted him. We agree.

The crime of assault with intent to do great bodily harm is defined by MCL 750.84(1)(a). That statute provides that a person who "[a]ssaults another *with intent to do great bodily harm*, less than the crime of murder" is guilty of a felony. *Id*. (emphasis added). The crime of felonious assault is defined by MCL 750.82(1), which provides that "a person who assaults another person with a . . . dangerous weapon *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a felony . . . ." (Emphasis added.)

In *People v Davis*, 320 Mich App 484, 494-496; 905 NW2d 482 (2017), lv gtd 501 Mich 1064 (2018), we held that in a case involving a single assault, a judgment of conviction for both AWIGBH and aggravated domestic assault is inconsistent because the crimes are mutually exclusive.[3] As we stated in *Davis*:

> Clearly, these two offenses are mutually exclusive from a legislative standpoint. One requires the defendant to act with the specific intent to do great bodily harm less than murder; the other is committed without intent to do great bodily harm less than murder. We must give effect to the plain and unambiguous language selected by the Legislature. And the plain language of the statutes reveals that a defendant cannot violate both statutes with one act as he

[3] Although *Davis* dealt with aggravated domestic assault (second offense), MCL 750.81a(3), this does not change the analysis here.

> or she cannot both intend and yet *not* intend to do great bodily harm less than murder. [*Davis*, 320 Mich App at 490 (citations omitted).]

In this case, the trial court did not instruct the jury "regarding the lack of intent to do great bodily harm necessary to meet the statutory definition of [felonious assault]" because it is a "negative element" that need not be found by a jury. *Id*. at 494-495 (quotation marks and citation omitted). However, the trial court specifically instructed the jury that in order to convict defendant of AWIGBH, it had to find that he "intended to do great bodily harm." By convicting defendant on that charge, they made a finding—one we may not disturb—that defendant acted with the intent to do great bodily harm. But that finding is inconsistent with felonious assault as defined by MCL 750.82. We therefore conclude that the proper action for the trial court is to enter a judgment of conviction on the AWIGBH charge but not on the felonious-assault charge, even though the jury found defendant guilty of both.

Our dissenting colleague takes the view that our decision is inconsistent with *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979). We disagree. The defendant in *Doss* was a police officer who shot a suspected burglar. *Id*. at 93-94. He was charged with manslaughter and bound over for trial. *Id*. at 95. On interlocutory appeal, this Court concluded that the prosecution had not shown sufficient evidence to establish that the defendant acted without malice. *People v Doss*, 78 Mich App 541, 549; 260 NW2d 880 (1977). The prosecution appealed in the Supreme Court, which reversed, holding that the prosecution need not present evidence on a negative element, i.e., that the defendant acted without malice. *Doss*, 406 Mich at 97-99. As an ex-

ample, the Supreme Court explained that the prosecution did not have to prove that the defendant was not armed in order to convict of unarmed robbery. *Id*. at 99.

However, the issue before us today, and in *Davis*, was not addressed in *Doss*. First, *Doss* did not involve review of a judgment of conviction and the underlying jury verdict; the only issue was whether proof of the negative element was required to bind over the defendant on the charge of manslaughter. Second, in *Doss*, the only crime at issue was manslaughter—the court was not considering how to address a jury verdict that convicted the defendant of *both* manslaughter and murder for the same killing. In other words, there was no issue of inconsistent verdicts in *Doss*. The fact that courts do not instruct on negative elements is not problematic in single-offense cases. However, it is problematic when two crimes are charged on the basis of the same conduct and one of those crimes has a negative element that is the direct opposite of a positive element of the other charge.

Our review of the caselaw demonstrates that almost all cases dealing with this issue involved inconsistent verdicts arising out of compound felonies such as carrying a firearm during the commission of a felony (felony-firearm) and felony murder. These cases offer little guidance in the present setting because in the compound-felony setting, the jury is fully instructed on the elements of both offenses and is therefore aware that conviction of a compound felony is logically inconsistent with acquittal of the predicate felony. If they nevertheless choose to enter inconsistent verdicts, they may do so, and that conviction will stand. The Supreme Court addressed this issue in *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980):

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jurors reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [Citations omitted].[4]

Following *Vaughn*, the Supreme Court decided *People v Lewis*, 415 Mich 443, 446; 330 NW2d 16 (1982), in which the situation was reversed: the defendant was convicted of felony-firearm but acquitted of the underlying felony. The Court noted that

> [t]he inconsistency in the instant verdicts suggests that the juries either compromised or were lenient.
>
> If the jury was lenient, the defendant was not prejudiced by the inconsistency in the verdicts and has no cause for complaint. In that hypothesis, although 12 jurors agreed that the defendant was guilty beyond a reasonable doubt of the underlying felony, they nonetheless extended mercy, convicting him only of what they may have thought was a lesser offense instead of both. [*Id*. at 450-451 (footnotes omitted).]

However, the instant case, like *Davis*, does not involve a compound offense. It involves conviction of two crimes that—by the plain text of the relevant

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[4] See also *People v Putnam*, 309 Mich App 240, 251; 870 NW2d 593 (2015) (upholding the defendant's conviction for armed robbery and second-degree murder despite the jury's acquittal of first-degree felony murder).

statutes—are fundamentally inconsistent. And unlike the cases involving compound offenses, the jury in this case did not know that its verdicts were inconsistent. Given that the instructions did not inform the jury of the negative element of felonious assault, the jury would conclude that conviction of felonious assault is fully consistent with conviction of AWIGBH. The instant verdict, therefore, was *not* the result of compromise or leniency given that defendant was convicted of both charges. Nor could it be the result of jury error beyond a court's ability to correct. To restate the point, in a case in which a defendant is charged only with felonious assault, the fact that there is no instruction on the negative element is of no consequence. However, when a defendant is charged with both felonious assault and AWIGBH, the lack of instruction on the negative element deprives the jury of knowledge that conviction of both charges would be inconsistent. As noted, if a jury decides to render what it knows to be an inconsistent verdict, it may do so and the court may not interfere. However, when the jury is unaware that its verdict is inconsistent, we should not presume that the jury would have reached the same verdict had it known the full text of the statute under which the defendant is charged.

Our dissenting colleague concludes that because the jury is not asked to find the negative element in felonious assault, the two verdicts are not in conflict. We agree that there is no conflict between the jury's factual findings and the instructions it was given. However, the court, which knows the full text of the relevant statutes, was obviously aware of the inconsistency, and it is the role of courts to ensure that the entirety of the felonious-assault statute is considered. Failing to do so renders a portion of the statute nugatory. *People v Kloosterman*, 296 Mich App 636,

639-640; 823 NW2d 134 (2012). While a jury does not know that a finding of intent to do great bodily harm is inconsistent with the statutory definition of felonious assault, the court does, and it may not enter judgment when the jury has found that one of the offense's elements, albeit a negative element, has not and cannot be met. The court, cognizant of the entire statute, must ensure that the judgment it enters is consistent with the law as written. Accordingly, we conclude that defendant's felonious-assault conviction should be vacated and the AWIGBH conviction affirmed.

D. OFFENSE VARIABLE (OV) 19

Finally, defendant argues that the trial court erred when it assessed 10 points for offense variable (OV) 19 of the sentencing guidelines. We disagree.[5]

MCL 777.49 provides, in pertinent part:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *

[5] In *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016), this Court observed:

> Issues involving the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq*., . . . are legal questions that this Court reviews de novo. On appeal, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [Quotations marks and citations omitted.]

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice .... 10 points

"Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts." *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010). "OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense." *Sours*, 315 Mich App at 349. See also *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004) (holding that the act of giving a false name to a police officer constitutes interference with the administration of justice for purposes of OV 19), and *People v Hershey*, 303 Mich App 330, 344; 844 NW2d 127 (2013).

Although this case does not involve the combination of factors that was found to constitute interference with the administration of justice in *Ericksen*, 288 Mich App at 204, we agree that defendant's act of disposing of the weapon used to stab Zarkin, as well as disposing of the clothing he was observed wearing during the attack, supports the trial court's finding that defendant interfered with the police investigation of the crime and, thus, interfered with or attempted to interfere with the administration of justice. Accordingly, the trial court did not err when it assessed 10 points for OV 19.

Affirmed in part and vacated in part.

STEPHENS, P.J., concurred with SHAPIRO, J.

GADOLA, J. (*dissenting*). The majority vacates defendant's conviction for felonious assault, MCL 750.82, on the ground that the jury rendered mutually exclusive verdicts by finding defendant guilty of both felonious

assault and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a). I respectfully dissent and would affirm defendant's convictions for both felonious assault and AWIGBH.

Felonious assault is statutorily defined as an assault on "another person with a gun, revolver, pistol, . . . or other dangerous weapon *without inten*[*t*] *to commit murder or to inflict great bodily harm less than murder* . . . ." MCL 750.82 (emphasis added). In contrast, AWIGBH is statutorily defined as an assault on "another person *with intent to do great bodily harm, less than the crime of murder*." MCL 750.84(1)(a) (emphasis added). On the basis of these statutory definitions, the majority holds that the two offenses are mutually exclusive when premised on the same underlying act because a defendant is incapable of committing a single assault both with and without the intent to inflict great bodily harm less than murder.

However, the convictions presently at issue are not mutually exclusive. Our Supreme Court held in *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979), that negative concepts, such as the absence of an element, must not be treated as positive elements of a crime that the prosecution must prove beyond a reasonable doubt. Specifically, the issue confronted in *Doss* was whether the absence of malice was an affirmative element the prosecution was obligated to establish in order to prove the crime of manslaughter. *Id*. at 97. "Manslaughter" was statutorily defined as the injuring and causing of another's death " 'by the discharge of any firearm, pointed or aimed, intentionally but *without malice*, at any such person . . . .' " *Id*., quoting MCL 750.329 (emphasis added). Our Supreme Court concluded that the absence of malice was not an essential element of manslaughter, reasoning that "[w]hile the

absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt." *Doss*, 406 Mich at 99.

The reasoning set forth in *Doss* applies with equal force in the present case. Although the absence of intent to inflict great bodily harm less than murder is fundamental to felonious assault in a "general definitional sense," *id*., it is not a positive element that the prosecution must establish, or that the jury must find, beyond a reasonable doubt.[1] Indeed, the elements necessary to prove felonious assault are " '(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.' " *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Meanwhile, the elements necessary to prove AWIGBH are " '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.' " *People v Brown*, 267 Mich App 141, 147; 703

[1] The reason for this is easily understood. To require the prosecution to prove, as an element of felonious assault or any other similarly defined criminal offense, a lack of a particular intent would be to assign the prosecution the near impossible task of proving a negative in order to obtain a conviction. This task would be all the more daunting were it to require, as it would here, proving the absence of a particular state of mind. Such an outcome cannot be what was intended when the Legislature defined the crime of felonious assault, any more than it could have been what was intended when it established the elements of manslaughter. Rather, with regard to intent, the Legislature has merely described something that is *not* part of the prosecution's burden in establishing the crime of felonious assault. This is precisely the point made by our Supreme Court in *Doss* when it stated, "In the instant case, 'without malice' is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt." *Doss*, 406 Mich at 99.

NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis omitted). Notably absent from the elements necessary to prove felonious assault is a lack of intent to inflict great bodily harm less than murder. By comparison, the existence of such intent is an element necessary to prove AWIGBH. Thus, the two offenses do not incorporate mutually exclusive elements.

This rationale is consistent with this Court's analysis of the same issue in *People v Price*, unpublished per curiam opinion of the Court of Appeals, issued June 1, 2017 (Docket No. 330710), pp 3-4, lv gtd 501 Mich 1066 (2018), in which the Court concluded that convictions for felonious assault and AWIGBH premised on the same underlying act are not mutually exclusive. Relying on *Doss*, this Court held in *Price* that "[t]he absence of intent to commit murder or to inflict great bodily harm less than murder is fundamental to felonious assault 'in a general definitional sense,' but it is not an actual element of the crime itself." *Id*. at 3, quoting *Doss*, 406 Mich at 99. In examining the elements necessary to establish the two offenses, the Court observed that felonious assault requires the use of a dangerous weapon but does not require the intent to do great bodily harm less than murder, while AWIGBH does not require the use of a dangerous weapon but does require the intent to do great bodily harm less than murder. *Id*. at 3-4. Thus, the Court's analysis demonstrated that the two offenses are mirror images of each other and are not mutually exclusive. Following a bench trial, the trial court in *Price* found that the defendant had assaulted the victim both with a dangerous weapon and with the intent to inflict great bodily harm less than murder. *Id*. at 4. Accordingly, the trial court found the defendant guilty of felonious assault because he committed the assault with a dan-

gerous weapon and found him guilty of AWIGBH because he assaulted the victim with the intent to inflict great bodily harm less than murder. *Id*. This Court upheld the convictions, holding that because "[t]he trial court's verdicts may be reconciled with its factual findings, it did not render inconsistent verdicts." *Id*., citing *People v Ellis*, 468 Mich 25, 27; 658 NW2d 142 (2003).

The majority relies on this Court's analogous opinion in *People v Davis*, 320 Mich App 484, 493-495; 905 NW2d 482 (2017), lv gtd 501 Mich 1064 (2018), in which the Court concluded that the offenses of aggravated domestic assault (second offense), MCL 750.81a(3), and AWIGBH incorporated mutually exclusive elements of intent. Like felonious assault, aggravated domestic assault is statutorily defined as being committed " 'without intending to commit murder or to inflict great bodily harm less than murder . . . .' " *Davis*, 320 Mich App at 490, quoting MCL 750.81a(2) (emphasis omitted). The Court recognized, however, that

> *a unique wrinkle exists in this case because the jury did not actually make contradictory findings* in reaching two mutually exclusive guilty verdicts. The trial court did not instruct the jury that in order to convict defendant of aggravated domestic assault it had to find that defendant did not act with intent to do great bodily harm. The only intent mentioned by the court was "either to commit a battery, or to make [the victim] reasonably fear an immediate battery." [*Davis*, 320 Mich App at 494 (emphasis added).]

The Court further acknowledged our Supreme Court's holding in *Doss* that negative elements such as the lack of intent to inflict great bodily harm less than murder are not affirmative elements that must be proved by the prosecution or on which the jury must be instructed by the trial court. *Id*. at 494-495. Nonetheless,

the Court concluded that "[t]his does not nullify the error of convicting defendant of mutually exclusive offenses" on two grounds. *Id*. at 495. First, the prosecution should have levied the charges as alternate grounds for conviction. *Id*. Second, the trial court should have either reinstructed the jury regarding the alternate nature of the two offenses or vacated one of the convictions. *Id*.

The Court's conclusion in *Davis* is fundamentally at odds with our Supreme Court's holding in *Doss* and with its own recognition in *Davis* that the prosecution was not compelled to prove contradictory elements and that the jury was not required to make contradictory findings in reaching its guilty verdicts. Those details lead to the conclusion that the two offenses at issue were not, in fact, mutually exclusive. Accordingly, there was no reason for the prosecution to levy the charges as alternate grounds or for the trial court to reinstruct the jury or vacate one of the convictions.[2] The same analysis holds true in the present case.

Moreover, the *Davis* Court's comparison of the facts in the case to those in *United States v Daigle*, 149 F Supp 409 (D DC, 1957), aff'd 248 F2d 608 (1957), is untenable. In *Daigle*, the court determined that convictions of embezzlement and larceny stemming from the same transaction were mutually exclusive. *Id*. at 414. A conviction for embezzlement required the jury to find that the defendant had unlawfully converted prop-

[2] In the present case, the majority maintains that it was incumbent on the trial court to review the verdict because the jury was not instructed regarding the negative element set forth in MCL 750.82(1) and was therefore unaware that the two charged offenses conflicted. But again, because the statutory offenses at issue do not incorporate inconsistent affirmative elements that must be proved by the prosecution, no conflict arose. Therefore, there was no need for the trial court to either instruct the jury or to nullify the jury's conclusions.

erty owned by another but that was lawfully in the defendant's "possession or custody by virtue of his employment or office . . . ." *Id*. at 412, citing DC Code 22-1202 (1951). However, in order to convict the defendant of larceny, the jury was required to find that the defendant had taken property owned by another that defendant had no right to possess, i.e., the traditional notion of "stealing." *Id*. at 414. Therefore, by finding the defendant guilty of both charges, the jury in *Daigle* necessarily made the affirmative and contradictory findings that the defendant came into his initial possession or custody of the property at issue both lawfully (embezzlement) and unlawfully (larceny).

In contrast to *Daigle*, the jury in *Davis* was not required to make contradictory findings resulting in mutually exclusive verdicts. In order to find the defendant guilty of AWIGBH, the jury necessarily found that the defendant acted with the intent to inflict great bodily harm. However, as discussed earlier, to find the defendant guilty of aggravated domestic assault, the jury was not required to find the absence of the intent to do great bodily harm less than murder. Accordingly, as acknowledged by the Court in *Davis*, "the jury did not actually make contradictory findings . . . ." *Davis*, 320 Mich App at 494. Likewise, in the present case, although the jury was required to find that defendant acted with the intent to do great bodily harm less than murder with respect to AWIGBH, it was not required to find the absence of such intent with respect to felonious assault. *Daigle* is therefore inapposite to both *Davis* and the present case.[3]

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[3] Additionally, because the case was decided by the United States District Court for the District of Columbia, *Daigle* does not represent binding authority. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) ("Although lower federal court decisions may be persuasive, they are not binding on state courts.").

Because the offenses are not mutually exclusive, I would affirm defendant's convictions of both felonious assault and AWIGBH.

SMITH LIVING TRUST v ERICKSON RETIREMENT COMMUNITIES

Docket No. 338638. Submitted October 3, 2018, at Detroit. Decided October 30, 2018, at 9:00 a.m.

Plaintiff, David Smith, acting as personal representative and successor trustee of the estate and trust of his deceased father, Reginald Smith (decedent), brought an action in the Wayne Circuit Court against Erickson Retirement Communities; Henry Ford Village, Inc. (HFV); Redwood-ERC Management, LLC; Life Care Services; Senior Campus Services, LLC; and Senior Campus Living, Inc., alleging 12 counts—including breach of contract; fraud; unjust enrichment; conversion (both statutory and common-law); a statutory cause of action under the Living Care Disclosure Act (LCDA), MCL 554.801 *et seq*.; and civil conspiracy—regarding contracts and documents pertaining to decedent's residence at a retirement community owned by HFV. Decedent had paid a "refundable entrance deposit" for his unit at the retirement community, and one condition precedent to the refund was the reoccupancy of decedent's unit by a new resident, including payment of a new entrance deposit. In an effort to expedite reoccupancy of the unit following decedent's death, HFV and plaintiff agreed to a reduction in the unit's entrance deposit by executing a "Discounted Refund Addendum." This addendum and a provision of decedent's contract with HFV—the Residence and Care Agreement (the RCA)—provided that if a unit's reoccupancy entrance deposit was reduced, any refund of the original deposit would likewise be reduced. Therefore, following decedent's death and the reoccupancy of his unit at a reduced rate, HFV issued a check to plaintiff that reflected the reduced entrance deposit and the subtraction of unchallenged fees. Plaintiff argued that HFV should have refunded the entirety of decedent's deposit, notwithstanding the terms of the RCA or the addendum. At oral argument, plaintiff conceded that HFV violated none of the terms of its contract with decedent or its agreement with plaintiff. Defendants moved for summary disposition, and the court, David J. Allen, J., granted defendants summary disposition of all claims. Plaintiff appealed.

The Court of Appeals *held*:

1. A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) that the other party breached (3) thereby resulting in damages to the party claiming breach. In this case, plaintiff's breach-of-contract claim was premised on reforming the parties' contracts—the RCA and documents executed contemporaneously with the RCA. An agreement may be reformed because of a unilateral mistake that was induced by fraud. To prevail on a theory of fraud in the inducement, a plaintiff must prove five essential elements, one of which is reasonable (or justified) reliance. Plaintiff conceded that HFV had no obligation to refund decedent's entrance deposit until decedent's unit was reoccupied and the new resident paid a new entrance deposit in full; rather, plaintiff argued that the provisions of the RCA and the addendum requiring plaintiff to accept a refunded entrance deposit were unenforceable. The fact that some documents described the entrance deposit as "100% refundable" did not conflict with the existence of possible limitations on the amount of that refund; a "100% refundable" sum is one that *can* be refunded entirely, not one that *necessarily will* be refunded entirely. Moreover, plaintiff failed to provide any evidence beyond mere speculation to support each element of his fraud-in-the-inducement theory. There was no genuine issue of material fact that both plaintiff and decedent were given direct information that refuted any alleged misrepresentations about the terms of the RCA and the refund addendum. Therefore, the trial court correctly concluded that plaintiff's allegations of fraud in the inducement concerning the RCA and the addendum did not preclude summary disposition of his claim for breach of contract. Finally, plaintiff's attempts to avoid enforcement of the refund addendum were barred by the tender-back rule, which provides that an offer to tender back consideration must occur not only within a reasonable time after execution of the agreement, but in all cases prior to or simultaneously with the commencement of any proceeding raising a legal claim in contravention of the agreement. Plaintiff presented no evidence that he ever offered to tender back the discounted refund that he received. Additionally, because the only recognized exceptions to the tender-back rule in Michigan are a waiver of the plaintiff's duty by the defendant and fraud in the execution, plaintiff's contention that the RCA and the addendum were unenforceable under provisions of the since-repealed LCDA did not have merit. Accordingly, the trial court did not err by granting defendants summary disposition on plaintiff's claims concerning breach of contract and fraud.

2. Section 29(1) of the LCDA, former MCL 554.829(1), provided a private cause of action for violations of § 6(1), former MCL 554.806(1). Section 29(1) stated, in pertinent part, that a person who offers or sells a life interest or long-term lease in violation of § 6(1) is liable to the person purchasing the life interest or lease for damages and repayment of all fees paid to the facility less the reasonable cost of rental and care provided until discovery or until the violation should reasonably have been discovered and with interest at 6% from the date of purchase and reasonable attorney fees and court costs. Section 6(1) prohibited entities such as HFV from employing a device, scheme, or artifice to defraud; making an untrue statement of a material fact or failing to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and engaging in an act, practice, or course of business that operated or would operate as a fraud or deceit upon a person. The plain language of § 29(1) unambiguously provided that damages exceeding "the reasonable cost of rental and care provided until discovery or until the violation should reasonably have been discovered" were an element of a claim pursued under § 29(1). Absent such damages, there would be no liability to enforce and, consequently, no claim. In this case, plaintiff could not satisfy the damages element as a matter of law. Plaintiff's "reasonable cost of rental and care" necessarily exceeded the purported damages plaintiff identified to support his LCDA claim. Thus, even if plaintiff had an otherwise viable claim for violations of § 6(1) of the LCDA, the trial court did not err by granting defendants summary disposition of that claim. And, in any event, plaintiff failed to make the requisite showing that defendants' conduct constituted a violation of § 6(1). HFV gave decedent a copy of all relevant documents and ample time to review them in their entirety, and it repeatedly admonished him to seek independent legal counsel. No rational trier of fact could conclude that defendants' conduct in connection with the "offer" or "sale" of decedent's unit was part of a device, scheme, or artifice to defraud; that defendants made an untrue statement of a material fact or failed to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or that defendants engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon a person. Accordingly, summary disposition of this claim was appropriately granted.

3. The trial court properly granted summary disposition of plaintiff's claims for statutory and common-law conversion. Plaintiff's claims were barred by the tender-back rule and also

failed on the merits. Plaintiff presented no evidence that HFV had an obligation to keep intact or deliver the full entrance deposit or that HFV's dominion over that deposit was either wrongful or contrary to the interests of decedent and his trust. Consequently, the trial court did not err by granting defendants summary disposition of plaintiff's conversion claims.

4. The existence of an enforceable, express agreement between the parties covering the same subject matter entitled defendants to summary disposition of plaintiff's claim for unjust enrichment. Furthermore, because plaintiff's unjust-enrichment claim sought to recover funds that plaintiff agreed HFV could retain, it plainly contravened the terms of the refund addendum. Accordingly, the tender-back rule barred plaintiff's claim for unjust enrichment. Therefore, the trial court correctly granted summary disposition of this claim.

5. The trial court did not err by granting defendants summary disposition of the civil-conspiracy claim. Plaintiff failed to adduce sufficient evidence of any separate actionable tort to survive summary disposition. Moreover, to the extent that plaintiff's claim for civil conspiracy was based on allegations that defendants failed to comply with contractual duties, the claim could not proceed as a matter of law. Finally, because the tender-back rule barred plaintiff from avoiding enforcement of the refund addendum, plaintiff could not cite any damages arising from the alleged civil conspiracy, which is the foundation of any civil-conspiracy action. Accordingly, the trial court did not err by granting defendants summary disposition of the civil-conspiracy claim.

6. The trial court did not err by granting defendant Redwood-ERC summary disposition of plaintiff's "claim" of successor liability against it. Although "successor liability" is commonly described as a "claim," it is truly a theory of liability that depends on an underlying breach of a legal duty or the commission of underlying wrongful conduct, and because summary disposition of all other claims was appropriately granted in favor of defendants, this issue was moot. Even presuming that Redwood-ERC could be held liable for the acts and omissions of its predecessors under a theory of successor liability, because those predecessors were entitled to summary disposition, it necessarily followed that Redwood-ERC was also entitled to summary disposition.

Affirmed.

Mantese Honigman, PC (by *David Honigman*, *Krista Hosmer*, and *Jordan Segal*) for plaintiff.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Dennis M. Haffey*) for Henry Ford Village, Inc.

Blake Kirchner Symonds Larson Kennedy & Smith (by *Richard P. Smith*) for Redwood-ERC Management, LLC.

Plunkett Cooney (by *Jeffrey C. Gerish* and *Patrick C. Lannen*) for Life Care Services, LLC.

Before: MURRAY, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Acting as personal representative and successor trustee, respectively, of the estate and trust of his deceased father Reginald Smith (decedent), plaintiff, David Smith, appeals as of right the trial court's order granting defendants summary disposition under MCR 2.116(C)(10)[1] of all claims in this action. We affirm.

I. FACTUAL BACKGROUND

A. INTRODUCTION

Decedent resided in a unit at the Henry Ford Village Continuing Care Retirement Community (the retirement community) in the years immediately preceding

[1] Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and the trial court did not explicitly state the subpart under which it ruled. However, when announcing its ruling, the trial court did not seemingly conclude that any of plaintiff's claims were barred for purposes of MCR 2.116(C)(7), and it considered evidence outside the pleadings and the several documents that constitute the parties' written agreement. Therefore, we review the trial court's decision under MCR 2.116(C)(10). See *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007).

his death. The retirement community is owned by defendant Henry Ford Village, Inc. (HFV), and it was managed, at various times, by the other defendants. Decedent was required to pay a "refundable entrance deposit" for his unit. The entirety of this deposit was "refundable" to decedent's estate or trust as of decedent's death in 2013, subject to several conditions precedent and minus certain fees that plaintiff does not challenge. HFV refunded most, but not all, of the remainder of decedent's entrance deposit, pursuant to an agreement with plaintiff, which, in turn, was pursuant to a provision of decedent's contract with HFV. The gravamen of this case is plaintiff's contention that HFV should have refunded the entirety of decedent's deposit, notwithstanding the terms of decedent's contract with HFV or plaintiff's agreement with HFV. At oral argument, plaintiff conceded that HFV violated none of the terms of its contract with decedent or its agreement with plaintiff, as those documents are actually written.

One of the conditions precedent to a refund was reoccupancy of decedent's unit by a new resident, including the payment of a new entrance deposit. Decedent's unit remained unoccupied approximately nine months after it was vacated. HFV suggested to plaintiff that, because of the decline in the real estate market, the unit was priced too high at $152,000. Plaintiff agreed to a reduction in the unit's entrance deposit. In 2016, decedent's unit was reoccupied for an entrance deposit of $136,000. Under the agreement and one of the contractual provisions in the Residence and Care Agreement (the RCA), if a unit's reoccupancy entrance deposit is reduced, any refund of the original deposit will be likewise reduced. Consequently, HFV issued a check to plaintiff in the amount of $126,861.93, reflecting the reduced entrance deposit

and the subtraction of the unchallenged fees. Plaintiff asserts that, notwithstanding the agreement to the lesser amount, $16,000 of decedent's entrance deposit refund remains outstanding.

B. CONTRACTS AND DOCUMENTS EXECUTED BY DECEDENT

Several contracts and other documents are at issue in this matter. On May 22, 2006, decedent executed a "Refund of Entrance Deposit Form," which, in relevant part, stated that "the Resident" (i.e., decedent) was

> entitled to a refund of the Entrance Deposit . . . under certain specified conditions during Resident's lifetime or upon Resident's death based upon termination of the applicable Care Agreement. The conditions for the refund of the Entrance Deposit are set forth in the Care Agreement.

The form further expressly advised the Resident to "**review this Refund Form with an attorney or other estate planning professional prior to execution** . . . ." Finally, the form provided, immediately above the signature line, that "**Resident hereby acknowledges that he or she has read the following preliminary statements and instructions, reviewed the attached options for a refund of the Entrance Deposit, and understands the purpose and consequences of this Refund Form**." Decedent nominated himself, as trustee of his revocable living trust (the trust), as sole beneficiary of any refund of his entrance deposit.

On June 8, 2006, decedent executed several more documents. One of those was a single-page document entitled "Helpful Information Regarding Your Refund of Entrance Deposit and Your Residence and Care Agreement." This document described itself as "a brief and general overview of some sections from the Resi-

dence and Care Agreement," but cautioned that it "is not meant to replace the Residence and Care Agreement nor supercede [sic] any of its terms . . . ." It stated, in relevant part, that "[i]n general, in the event of death of a resident, the entrance deposit will be refunded within 30 days of their apartment being re-settled (a new entrance deposit has been placed on that apartment)." The document did not mention any reduction in the entrance deposit. It concluded by stating that "[y]our Residence and Care Agreement is designed to offer you many protections" and inviting the resident to discuss any questions about the RCA with HFV's marketing office.

The same day, decedent executed another single-page document entitled "Receipt of Disclosure Statement." In relevant part, decedent acknowledged that he had received and had sufficient time to review[2] a disclosure statement required by the Living Care Disclosure Act (LCDA), MCL 554.801 *et seq*.—specifically by MCL 554.819.[3] The disclosure statement itself, which included a table of contents, provided, in relevant part:

REQUIRED DISCLOSURES

1. YOU HAVE THE RIGHT TO CANCEL YOUR PURCHASE AND RECEIVE A FULL REFUND WITHIN SEVEN (7) DAYS AFTER YOU HAVE EITHER MADE A DEPOSIT AND RECEIVED A COPY OF THIS DISCLOSURE STATEMENT OR EXECUTED THE RESIDENCE AND CARE AGREEMENT AND RECEIVED A COPY OF

[2] Plaintiff admitted at oral argument that decedent had been given all the documents ahead of time and the opportunity to review them before returning to sign them.

[3] The LCDA was repealed effective April 2, 2015, by 2014 PA 448 and replaced by the Continuing Care Community Disclosure Act, MCL 554.901 *et seq*.

THIS DISCLOSURE STATEMENT. YOU CANNOT BE REQUIRED TO MOVE INTO THE FACILITY BEFORE THE EXPIRATION OF THIS 7 DAY PERIOD.

2. THE SIGNING OF A LIFE INTEREST OR LONG TERM LEASE IS AN INVESTMENT THAT MAY INVOLVE A HIGH DEGREE OF RISK AND YOU SHOULD SEEK ADVICE FROM AN ATTORNEY OR OTHER FINANCIAL ADVISOR INDEPENDENT OF THE FACILITY.

3. **THIS DISCLOSURE STATEMENT IS REQUIRED BY LAW TO CONTAIN ALL MATERIAL FACTS REGARDING THE OFFERING MADE HEREBY. THE MICHIGAN OFFICE OF FINANCIAL AND INSURANCE SERVICES HAS NOT PASSED UPON THE ACCURACY OF THIS DISCLOSURE STATEMENT, NOR HAS THE OFFICE APPROVED OR DISAPPROVED THE OFFERING DESCRIBED HEREIN. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL AND SHOULD BE REPORTED . . . .**

4. NO PERSON IS AUTHORIZED TO MAKE ANY PROMISES IN CONNECTION WITH THIS OFFERING OTHER THAN THOSE CONTAINED IN THIS DISCLOSURE STATEMENT.

* * *

SECTION 5 – ENTRANCE DEPOSITS (SUMMARY)

The one-time refundable Entrance Deposit must be paid by the resident of each Living Unit, with 10 percent due upon signing a Residence and Care Agreement and the remainder due prior to occupancy. A list of the current Entrance Deposits is attached as Exhibit 2. The Entrance Deposit is determined by the size of and amenities available in the living unit. The Entrance Deposit is 100% refundable in accordance with the terms of the Residence and Care Agreement.

* * *

SECTION 7 – OTHER SERVICES AND CHARGES

* * *

Residents have no further financial obligations to Henry Ford Village other than those described in the Residence and Care Agreement, attached as Exhibit 6.

* * *

SECTION 11 – CANCELLATIONS AND REFUNDS

* * *

C. Termination After Six Months of Occupancy: A Resident is entitled to a full refund of the Entrance Deposit if the Resident terminates or all Joint Residents terminate the Residence and Care Agreement more than six months after taking occupancy. The Resident must give Henry Ford Village 90 days [sic] notice in writing. The Resident shall be entitled to a full refund of the Entrance Deposit, less the applicable Monthly Service Package, if previously not paid, the Vacancy Fee, the Marketing Fee, and all other outstanding charges. The unearned portion of such refund shall be refunded within 45 days after the Notice is given or upon re-occupancy of the Unit, whichever occurs first. The earned portion of the Entrance Deposit shall be paid within 30 days of the date that a new qualified Resident pays a new Entrance Deposit in full.[4]

* * *

SECTION 12 – DIVORCE, DEATH OF SPOUSE, MARRIAGE

A. Death of a Single Resident: If a single Resident dies during residency at Henry Ford Village, the Residence and Care Agreement is automatically terminated.

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[4] The distinction between "earned" and "unearned" is not relevant to this appeal. It is undisputed that the entirety of decedent's entrance deposit was "earned" by the time of his death.

> The refund of the Entrance Deposit will be made within thirty (30) days of fulfillment of the following conditions: the Resident's or the Resident's representative's vacating the living unit, removing all possessions, paying all outstanding charges, and a new, qualified Resident paying a new Entrance Deposit in full.

Plaintiff's counsel admitted in the trial court that a copy of the RCA was attached to the disclosure statement.

Finally, also on June 8, 2006, decedent executed the RCA itself. With its attached schedules and table of contents, the RCA was 29 pages in length. Its table of contents listed the title and page of each of its sections and subsections. In pertinent part, the RCA provided:

> **Section 7. REFUNDABLE ENTRANCE DEPOSIT**
>
> 7.1 Payment of Refundable Deposit. Resident shall pay to HENRY FORD VILLAGE a total Entrance Deposit, as indicated in Schedule I, attached and incorporated hereto, on or before taking residence at the Community. . . .
>
> * * *
>
> 7.4 Refund of Deposit after Occupancy. After occupancy of the Continuing Care Unit and subject to the terms and conditions of Section 7.5 of this Agreement, HENRY FORD VILLAGE shall pay a refund of the Entrance Deposit to the Resident as follows.
>
> 7.4.1 Refund during Lifetime. These terms apply whether Resident or Henry Ford Village terminates the Agreement during Resident's lifetime . . . .
>
> * * *
>
> 7.4.2 Refund due to Death of Resident. If Resident dies after the Occupancy Date, HENRY FORD VILLAGE shall pay a refund of the Entrance Deposit within thirty (30) days after fulfillment of the following conditions: (1) the Resident's personal representative or family has removed

all possessions from the Continuing Care Unit; (2) the Resident's personal representative or family has signed a unit release for the Continuing Care Unit; (3) the Resident's personal representative or family has paid all outstanding fees and charges; and (4) a qualified new resident has signed a new Residence and Care Agreement for the continuing Care Unit and has settled in full by paying a new entrance deposit. The refund shall be payable by HENRY FORD VILLAGE to the beneficiaries named in a duly executed Refund of Entrance Deposit Form or, if there is no Refund of Entrance Deposit Form, to the personal representative of Resident's estate. . . .

Please be advised that HENRY FORD VILLAGE is not obligated to refund the full Entrance Deposit until, or unless, the conditions stated above are fulfilled, including the re-subscription of the Unit.

7.5 Limitation on Amount of Refund. The amount of the refund which HENRY FORD VILLAGE is obligated to pay to Resident or Resident's estate and which Resident or Resident's estate is entitled to receive shall normally be the amount of Resident's Entrance Deposit at termination minus any outstanding fees or charges unless paid separately. . . . With respect to the refund of any Earned Portion of the Entrance Deposit, if Resident's Continuing Care Unit is not reoccupied within a reasonable period of time, in HENRY FORD VILLAGE's sole discretion, by a qualified new resident with an Entrance Deposit equal to or greater than Resident's Entrance Deposit, then HENRY FORD VILLAGE will so notify Resident or Resident's personal representative. Resident or Resident's personal representative may then direct HENRY FORD VILLAGE to re-market the Continuing Care Unit for a discounted Entrance Deposit. The amount of the discounted Entrance Deposit, when received from a qualified new resident, minus the Unearned Portion already refunded, will constitute the amount of the refund of the Earned Portion of the Entrance Deposit to Resident.

* * *

> **Section 14. MISCELLANEOUS PROVISIONS**
>
> 14.1 Documents Incorporated by Reference. This Agreement includes the Admissions Application for residence, the Financial Information Form, the Resident Information Form, including Resident's medical records, if any, and the Refund of Entrance Deposit Form. . . . Resident acknowledges that HENRY FORD VILLAGE will rely on statements of Resident in these documents and warrants that all statements are true and complete to the best of Resident's knowledge.
>
> * * *
>
> 14.4 Entire Agreement. This Agreement and the documents referenced in Section 14.1 represent the entire agreement between HENRY FORD VILLAGE, Resident, and Guarantor, if any, and supersedes all prior Agreements and negotiations. Except as contained herein or in any contemporaneous, written agreements, there are no promises or agreements between the parties.
>
> * * *
>
> 14.6 Disclosure Statement. Resident hereby acknowledges that Resident received the latest disclosure statement of HENRY FORD VILLAGE at least three (3) days before signing this Agreement or before transferring any money to HENRY FORD VILLAGE, whichever is earlier, and has reviewed such statement.

Immediately above the signature lines was the statement:

> **This document is a legal contract. Signing this Agreement means that you are legally bound by its terms. Therefore, you should seek the advice of a legal or financial advisor.**

Decedent initially paid an entrance deposit of $145,000, but in 2008 he transferred to a more expensive unit, which increased his total entrance deposit to $152,000.

C. EVENTS FOLLOWING DECEDENT'S DEATH

Following decedent's death on April 30, 2013, his children removed his belongings from his unit, and HFV, through its agents, began to market the unit to new prospective tenants. The unit was listed for the original entrance deposit of $152,000. As of January 2014, the unit remained unoccupied. HFV sent correspondence to plaintiff opining that decedent's unit was likely overpriced because of the drastic decline in the real estate market. HFV indicated that the average entrance deposit recently charged for similar units was $129,000 and further that 24 similar units were available at the time. HFV noted that under § 7.5 of the RCA, if plaintiff wished to do so, he could agree to lower the unit's listed entrance deposit—at the expense of lowering the resulting refund commensurately—in hopes of pricing the unit competitively and thereby expediting reoccupancy. Plaintiff ultimately agreed to do so.

Therefore, on February 24, 2014, plaintiff and HFV executed a "Discounted Refund Addendum" in which the parties, in significant part, agreed to discount the entrance deposit for decedent's unit to $136,000 pursuant to § 7.5 of the RCA. The addendum contained an acknowledgment that plaintiff's entrance deposit refund would be reduced by an equal amount. The addendum further provided that plaintiff had freely entered into the addendum, had read and fully understood §§ 7.4.2 and 7.5 of the RCA, and had a reasonable opportunity to consult with an independent legal or financial advisor. Finally, the addendum provided:

> This Addendum, including the exhibits hereto, constitutes the entire understanding between the parties and supersedes any and all other prior agreements, written or oral, between the parties, with respect to the subject matter

> hereof. . . . This Addendum does not terminate, amend or reform any provision of the RCA executed by Resident and HFV, which shall remain in full force and effect, except as expressly stated herein.

HFV eventually found a new occupant for the decedent's unit, who paid an entrance fee of $136,000. On December 1, 2016, HFV remitted a check to plaintiff, as successor trustee of decedent's trust, for $126,861.93, which represented the reduced refund amount of $136,000, minus uncontested fees of $9,138.07. Plaintiff accepted that refund amount, cashing HFV's check.

Plaintiff subsequently instituted this action against defendants. In his first amended complaint, which sought certification of a class action including all others similarly situated,[5] plaintiff alleged 12 counts, among them breach of contract, fraud, unjust enrichment, conversion (both statutory and common-law), a statutory cause of action under the LCDA, and civil conspiracy. Following several months of discovery, defendants all moved for summary disposition. At the ensuing motion hearing, the trial court entertained extensive oral argument and then ruled from the bench in defendants' favor. This appeal followed.

II. STANDARD OF REVIEW

We review de novo the trial court's ruling concerning summary disposition, the proper interpretation of the parties' agreement, and any questions of statutory interpretation. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506-507; 885 NW2d 861 (2016);

[5] The trial court did not rule on class certification before granting defendants summary disposition. We likewise conclude that it is unnecessary to do so.

Kemp v Farm Bureau Gen Ins Co of Mich, 500 Mich 245, 251-252; 901 NW2d 534 (2017).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

"Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

III. ANALYSIS

Plaintiff, in an exceedingly loquacious and difficult to comprehend brief, has presented an ostensible 20 distinct issues for this Court to address. However, those stated issues resolve to seven effective claims. In essence, plaintiff argues that the trial court erred by granting summary disposition (1) to HFV on plaintiff's

claim for breach of contract, (2) to all defendants on plaintiff's several fraud-based claims, (3) to all defendants on plaintiff's statutory claims under the LCDA, (4) to all defendants on plaintiff's claims for common-law and statutory conversion, (5) to all defendants on plaintiff's claim for unjust enrichment, (6) to all defendants on plaintiff's civil-conspiracy claim, and (7) to defendant Redwood-ERC Management, LLC (Redwood-ERC) on plaintiff's "claim" of successor liability against it. We disagree with all seven claims.

A. BREACH OF CONTRACT

We conclude that the trial court did not err by granting defendants summary disposition of plaintiff's claim for breach of contract.

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). There can be no serious dispute that the RCA is a contract, although plaintiff argues that the disclosure statement should also be deemed contractual. HFV's alleged breach was, broadly, requiring plaintiff to accept a reduced refund. The amount of that reduction is plaintiff's claimed damages. Plaintiff's breach-of-contract claim is premised on first reforming the parties' contracts. As noted, plaintiff admitted that HFV did not breach any term of the RCA as written, without either reformation or considering the disclosure statement to be part of the same contract.

Initially, HFV argues that we are precluded by the RCA's merger clause from considering the disclosure statement. For purposes of resolving this appeal, we

disagree. "[I]t is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered." *Hamade v Sunoco, Inc*, 271 Mich App 145, 167; 721 NW2d 233 (2006). The merger clause provided that "[e]xcept as contained herein *or in any contemporaneous, written agreements*, there are no promises or agreements between the parties." (Emphasis added.) The Receipt of Disclosure Statement was signed by both decedent and HFV's agents on the same date as the RCA. We think it reasonable that decedent would have read, and thus relied on, both the RCA and the disclosure statement. We will presume, although we do not decide, that the disclosure statement constitutes a "contemporaneous, written agreement," the consideration of which is not precluded by the RCA's merger clause.

Plaintiff properly concedes that under both the RCA *and* the disclosure statement, HFV's duty to refund the entrance deposit was contingent on several conditions precedent. "A condition precedent is a fact or event that the parties intend must take place before there is a right to performance." *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 583; 739 NW2d 696 (2007) (quotation marks and citation omitted). "If the condition is not satisfied, there is no cause of action for a failure to perform the contract." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007). In particular, plaintiff accepts that HFV had no obligation to refund decedent's entrance deposit until decedent's unit was reoccupied and the new resident paid a new entrance deposit in full. Rather, plaintiff argues that § 7.5 of the RCA must be deemed unenforceable and, as a consequence, that he is entitled to a

refund of the entirety of decedent's entrance deposit irrespective of the amount of the new entrance deposit.

Several of plaintiff's arguments rely on interpreting the word "refundable." Specifically, plaintiff notes that the entrance deposit is described in some documents as "100% refundable." Plaintiff apparently deems this to mean that the entirety of the deposit necessarily must be refunded, thus conflicting with § 7.5 of the RCA. We disagree. "Refundable" is not defined in the RCA, so we consult a dictionary. See *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015). "Refundable" is an adjectival form of the verb "refund." *Merriam-Webster's Collegiate Dictionary* (11th ed). Importantly, the suffix in the word "refundable" is "-able," which—"chiefly in adjectives derived from verbs," e.g., "break*able*"—means "capable of, fit for, or worthy of (being so acted upon or toward)[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, the plain meaning of the word "refundable" is not the meaning suggested by plaintiff. A "100% refundable" sum is one that *can* be refunded entirely, not one that *necessarily will* be refunded entirely. Describing the deposit as "100% refundable" does not conflict with the existence of possible limitations on the amount of that refund.

Plaintiff further argues that decedent should be excused from any obligation to read the RCA and therefore from being bound by the RCA. Plaintiff admits that as a general rule, "one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Int'l Transp Ass'n v Bylenga*, 254 Mich 236, 239; 236 NW 771 (1931). Nevertheless, plaintiff contends that decedent was induced to execute the RCA by both fraudulent misrepresentations and acts of silent fraud. "Fraud in the inducement to

enter a contract renders the contract voidable at the option of the defrauded party." *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2007) (quotation marks and citation omitted). Moreover, "Michigan has long recognized that an agreement may be reformed because of a unilateral mistake that was induced by fraud." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 380; 761 NW2d 353 (2008). Plaintiff concludes that if he could prove decedent was fraudulently induced into executing the RCA, the trial court could reform the RCA as plaintiff has requested.

To prevail on a theory of fraud in the inducement, a plaintiff must prove five essential elements, one of which is reasonable (or justified) reliance. *Barclae v Zarb*, 300 Mich App 455, 482; 834 NW2d 100 (2013); *Hamade*, 271 Mich App at 167; *Custom Data*, 274 Mich App at 243. We note that *all* the above-described documents signed by decedent at least mentioned the RCA, and most of them either stated or implied that the entrance deposit refund was governed by the terms set forth in the RCA. The Refund of Entrance Deposit Form states:

> The conditions for the refund of the Entrance Deposit are set forth in the Care Agreement. Resident and Resident's beneficiaries are subject to all terms and conditions for the refund of the Entrance Deposit and should review the same carefully.

The "Helpful Information" sheet clearly explains that it "is not meant to replace the Residence and Care Agreement nor supercede [sic] any of its terms . . . ." The disclosure statement makes numerous references to the RCA, including an express statement that "[t]he Entrance Deposit is 100% refundable *in accordance with the terms of the Residence and Care Agreement*."

(Emphasis added.) No reasonable person would, after reviewing these documents, fail to appreciate that the RCA was the critical and controlling document. In any event, plaintiff admitted at his deposition that he did not know which documents decedent read before signing or whether decedent viewed any allegedly misleading advertisements.

Even if we were to conclude that the disclosure statement is misleading, which we do not, plaintiff has not provided any evidence beyond speculation that decedent declined to read the RCA because he read the contents of the disclosure statement. Fraudulent inducement must be proved by clear and convincing evidence. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Plaintiff could not merely rest on the allegations in his complaint. See MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Instead, to survive summary disposition, plaintiff was required to adduce substantively admissible evidence to support each of the essential elements of his fraud-in-the-inducement theory. See MCR 2.116(G)(6); *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996). Plaintiff has not done so. Therefore, the trial court correctly concluded that plaintiff's allegations of fraud in the inducement concerning the RCA did not preclude summary disposition of his claim for breach of contract.[6]

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[6] Plaintiff additionally argues that HFV failed to undertake reasonable or good-faith efforts to market the unit. See *Stewart v Henry Ford Village, Inc*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2014 (Docket No. 312130), pp 6-9. Unpublished opinions of this Court are not binding. MCR 7.215(C)(1). However, they may be instructive or persuasive. *Cox v Hartman*, 322 Mich App 292, 307-308; 911 NW2d 219 (2017). Nevertheless, *Stewart* is materially distinguishable: it appears that the Residence and Care Agreement in that case lacked a provision analogous to § 7.5 of the RCA here, and the plaintiff in *Stewart* did not agree to a reduced entrance deposit.

Consequently, we conclude that plaintiff is bound by the provisions of the RCA, including § 7.5. Plaintiff therefore attempts to minimize the importance of the refund addendum. However, "where one writing refers to another, the two writings are to be construed together," *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 389 n 27; 486 NW2d 600 (1992), "including any modifications agreed to by the parties" in *subsequent* writings, *Neville v Neville*, 295 Mich App 460, 469-470; 812 NW2d 816 (2012). In the refund addendum, plaintiff agreed to accept a discounted refund on behalf of the trust. Under the Michigan Trust Code, plaintiff, as successor trustee of decedent's trust (i.e., the named beneficiary of the refund), had legal authority to modify decedent's agreement with HFV. See MCL 700.7817. Consequently, the parties' 2006 agreement must be construed in accordance with the refund addendum.

Because plaintiff recognizes that the refund addendum is—unless unenforceable—fatal to his breach-of-contract claim, he argues strenuously against its enforceability. He first contends that he was fraudulently induced to enter into the refund addendum. However, plaintiff readily admitted at his deposition that he understood § 7.5 of the RCA and the terms of the refund addendum at the time that he executed the addendum. Plaintiff asserts that the addendum was fraudulently obtained because he was not provided a copy of the disclosure agreement before executing the addendum, but as discussed, because the RCA, including § 7.5, is binding, that omission is irrelevant. We conclude that the record provides no support for plaintiff's claim of fraudulent inducement.

Plaintiff's argument regarding HFV's alleged marketing infirmities largely depends on voiding § 7.5 of the RCA and the refund addendum.

Furthermore, plaintiff's attempts to avoid enforcement of the refund addendum are barred by the tender-back rule, under which a party seeking to set aside a compromise "must tender the recited consideration before there is a right to repudiate the release." *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155, 165; 458 NW2d 56 (1990). An offer to tender back consideration "must occur not only within a reasonable time after execution of the agreement, but in *all* cases prior to or simultaneously with the commencement of any proceeding raising a legal claim in contravention of the agreement." *Id*. at 159 (emphasis added). Furthermore, an offer to tender back must be made even "if it is apparent that it would not be accepted." *Randall v Port Huron, St C & MC R Co*, 215 Mich 413, 424; 184 NW 435 (1921). The only exceptions entail a waiver by the other party or fraud in the execution, neither of which is present here. *Stefanac*, 435 Mich at 165.

Fraud in the execution exists when a party is induced, by fraud, to sign a document under the mistaken belief that he or she is actually signing something else. *Id*. at 166. Plaintiff makes no such claim. Moreover, plaintiff has presented no evidence that he ever offered to tender back the discounted refund that he received. Even if he were to now make such an offer, it is too late. See *id*. at 159 (holding that tender back must occur before filing suit); *Randall*, 215 Mich at 424 (holding that a delay of "two and a quarter years . . . cannot be said to be a reasonable time as a matter of law"). Plaintiff cashed HFV's refund check on December 7, 2016, approximately eight months *after* he initiated this action in the trial court, and also about seven months after he had notice that HFV was asserting, as an affirmative defense, that plaintiff's claims in this action were barred absent "tender back

of any refund received . . . ." Indeed, even now, plaintiff has not indicated that he would be willing to tender back the partial refund if doing so was necessary to save his claims.

Plaintiff also contends that the RCA and the addendum are unenforceable under various provisions of the since-repealed LCDA. However, we are aware of no exception to the tender-back rule for claims brought pursuant to the LCDA, nor has plaintiff cited any authority suggesting an exception. On the contrary, in *Stefanac*, our Supreme Court held, "The *only* recognized exceptions in Michigan are a waiver of the plaintiff's duty by the defendant and fraud in the execution." *Stefanac*, 435 Mich at 165 (emphasis added; citations omitted).[7] Nevertheless, we note that plaintiff has presented a baffling argument that the LCDA somehow prohibits disclosure statements from incorporating terms of the RCA by reference, apparently on the theory that an analogous statute in Pennsylvania expressly permits such incorporation by reference. We take this as a mangled attempt to invoke the doctrine of *expressio unius est exclusio alterius*—that "the expression of one thing suggests the exclusion of all others." See *People v Wilson*, 500 Mich 521, 526; 902 NW2d 378 (2017). This argument might be plausible if plaintiffs were comparing one provision of

[7] Plaintiff's attempts to distinguish *Stefanac* are unpersuasive. In effect, plaintiff's argument is that when a plaintiff signs a release of a valid, noncontingent claim (i.e., a claim already actually owed), the tender-back rule is inapplicable. In this case, the claim *was* contingent—HFV only remarketed the unit at a lower entrance deposit, and later issued a refund based on that lower value, *because* plaintiff signed the refund addendum. Additionally, any factual differences between *Stefanac* and this case are immaterial. In *Stefanac*, our Supreme Court ruled unambiguously that the tender-back rule applies to release agreements. *Id*. at 165-166. The refund addendum is, in substance, a release agreement. Hence, the tender-back rule applies here.

Michigan's LCDA to another provision of Michigan's LCDA, but the mere fact that another state chose to expressly permit something in a different statute *that our Legislature did not see fit to expressly prohibit* is of no coherent significance.

In sum, we hold that the trial court did not err by granting defendants summary disposition of plaintiff's breach-of-contract claim. Plaintiff failed to present sufficient evidence of reliance to support his theory that decedent was fraudulently induced into executing the RCA, and plaintiff cannot challenge the RCA or the refund addendum on the grounds he now argues without having first offered to tender back the partial refund that he had accepted. In all other respects, we agree with plaintiff's concession that HFV breached no provision of any contract as written. Therefore, summary disposition of this claim was appropriate.

B. FRAUD

Plaintiff offers no freestanding arguments concerning his fraud claims but rather incorporates his arguments from his breach-of-contract analysis by reference. Reliance is an element of all forms of actionable fraud, including silent fraud. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012); *Hamade*, 271 Mich App at 171.[8] As we have already explained, plaintiff failed to adduce sufficient evidence of reliance

[8] Plaintiff contends that the trial court erroneously held reliance to be an element of silent fraud, relying on a nearly 18-year-old persuasive federal decision, *Gasperoni v Metabolife Int'l, Inc*, unpublished order of the United States District Court for the Eastern District of Michigan, issued September 27, 2000 (Case No. 00-71255). We disagree. The courts of this state are the ultimate arbiters of questions of state law. See *Montana v Wyoming*, 563 US 368, 377 n 5; 131 S Ct 1765; 179 L Ed 2d 799 (2011). Even assuming that *Gasperoni* represented an accurate statement of this state's common law at the time, subsequent Michigan

for his fraud arguments to survive summary disposition. Moreover, "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). See also *Titan Ins Co*, 491 Mich at 556 n 4 (explaining that a claim of fraud fails if "the allegedly defrauded party was given direct information refuting the misrepresentations"). In this case, decedent was given direct information in a copy of the RCA, and plaintiff was given—and admittedly read and understood—a copy of the refund addendum. Plaintiff cannot succeed on a claim of fraud related to the terms of either of those agreements. There is no genuine issue of material fact that both plaintiff and decedent were given direct information that refuted any alleged misrepresentations about the terms of the RCA and the refund addendum. Summary disposition of all of plaintiff's fraud claims was properly granted.

C. LCDA

Nor did the trial court err by granting defendants summary disposition of plaintiff's LCDA claim.[9] Plaintiff's claim is pursued under § 29(1) of the LCDA, former MCL 554.829(1), which provided a private cause of action for violations of § 6(1), among others,[10] as follows:

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decisions such as *Titan Ins Co* and *Hamade* have made clear that reliance is an essential element of a claim for silent fraud.

[9] Despite the repeal of the LCDA, plaintiff can nevertheless pursue a statutory cause of action under it because his claim accrued before the effective date of the repealing act. 2014 PA 488; MCL 8.4a; *Hurt v Michael's Food Ctr*, 249 Mich App 687, 692; 644 NW2d 387 (2002).

[10] The LCDA did *not* provide a private cause of action for alleged violations of § 8, which is the section that plaintiff contends mandates the express and explicit recitation of § 7.5 of the RCA in the disclosure statement. However, plaintiff correctly notes that the LCDA did provide a cause of action for more generally engaging in fraud or deceit.

> A person who offers or sells a life interest or long-term lease in violation of section[] 6(1) . . . is liable to the person purchasing the life interest or lease for damages and repayment of all fees paid to the facility *less the reasonable cost of rental and care provided until discovery or until the violation should reasonably have been discovered* and with interest at 6% from the date of purchase and reasonable attorney fees and court costs. [Emphasis added.]

Section 6(1) of the LCDA, former MCL 554.806(1), in relevant part prohibited entities such as HFV from:

> (a) Employ[ing] a device, scheme, or artifice to defraud.
>
> (b) Mak[ing] an untrue statement of a material fact or fail[ing] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.
>
> (c) Engag[ing] in an act, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

Under MCL 554.806(2), "fraud" and "deceit" were expressly "not limited to the common law definitions of fraud and deceit, but include the provisions of section 6(1)."

We need not determine whether HFV did, in fact, engage in "fraud" or "deceit" within the meanings set forth in the LCDA. The plain language of § 29(1) unambiguously provides that damages exceeding "the reasonable cost of rental and care provided until discovery or until the violation should reasonably have been discovered" are an element of a claim pursued under § 29(1). Absent such damages, there is no liability to enforce, and consequently there is no claim.

As a matter of law, plaintiff cannot satisfy that damages element. Because plaintiff does not contest the propriety of the $9,138.07 in fees that HFV deducted from the discounted refund, the only potential

damages figure that he has identified is $16,000—i.e., the difference between decedent's $152,000 entrance deposit and the $136,000 refund that was actually issued. Moreover, plaintiff alleges that his statutory claim did not accrue until after decedent's death, at which time plaintiff discovered that HFV would not refund the entire entrance deposit.

The codified monthly cost of care for decedent was $2,280 (i.e., 1.5% of his $152,000 entrance deposit). MCL 554.803(8); MCL 554.810(1)(d); Mich Admin Code, R 554.1(3). Accordingly, after just eight months of residency, the cost of care provided to decedent alone would have exceeded his purported damages of $16,000. Thus, we need not consider "the reasonable cost of rental," which is *also* to be deducted from the damages figure under § 29(1). Decedent resided in the retirement community for more than six years. At the end of his sixth year of residency, the codified cost of the care provided to him would have been $164,160. Therefore, plaintiff's "reasonable cost of rental and care" necessarily exceeds the purported damages plaintiff has identified to support his LCDA claim. Thus, even if plaintiff had an otherwise viable claim for violations of § 6(1) of the LCDA, the trial court did not err by granting defendants summary disposition of that claim.

In any event, plaintiff has failed to make the requisite showing that defendants' conduct in this case constituted a violation of § 6(1). It is undisputed that HFV gave decedent a copy of all relevant documents, ample time to review them in their entirety, and repeated admonishment to seek independent legal counsel. For the reasons already discussed, no reasonable person would have deemed the disclosure statement to be a substitute for the RCA itself. No rational

trier of fact could conclude that defendants' conduct in connection with the "offer" or "sale" of decedent's unit was part of "a device, scheme, or artifice to defraud"; that defendants made "an untrue statement of a material fact" or failed "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they [were] made, not misleading"; or that defendants "[e]ngage[d] in an act, practice, or course of business which operate[d] or would operate as a fraud or deceit upon a person." Summary disposition of this claim was thus appropriately granted.

D. CONVERSION

For dual reasons, the trial court also properly granted summary disposition of plaintiff's claims for statutory and common-law conversion. First, plaintiff's claims are barred by the tender-back rule because they conflict with the terms of the addendum, in which plaintiff agreed to accept the discounted refund and to permit HFV to retain the balance of decedent's entrance deposit. See *Stefanac*, 435 Mich at 159.

Second, plaintiff's conversion claims fail on the merits. Plaintiff has presented no evidence that HFV had an obligation to keep intact or deliver the specific $152,000 that decedent paid, in two installments, for his entrance deposit. See *Dunn v Bennett*, 303 Mich App 767, 778; 846 NW2d 75 (2014). Nor has plaintiff presented any evidence that HFV's exercise of dominion over the $152,000 was either wrongful or contrary to the interests of decedent and his trust. See *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 351-352; 871 NW2d 136 (2015). Rather, under the terms of the 2006 agreement as amended by the refund addendum, plaintiff expressly

consented to HFV's exercise of dominion over the $152,000. Even if plaintiff could definitively prove that HFV was obligated to refund the full $152,000 under the parties' agreement and failed to do so, "[t]he failure to perform a contractual duty cannot give rise to a tort action unless the plaintiff alleges a violation of a duty separate and distinct from the underlying contractual obligation." *Kisiel v Holz*, 272 Mich App 168, 172; 725 NW2d 67 (2006) (quotation marks and citation omitted). We cannot discern any such separate and distinct duty in plaintiff's allegations.

Consequently, the trial court did not err by granting defendants summary disposition of plaintiff's conversion claims.

E. UNJUST ENRICHMENT

The existence of an enforceable, express agreement between the parties covering the same subject matter entitles defendants to summary disposition of plaintiff's claim for unjust enrichment. See *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 64; 836 NW2d 898 (2013). Furthermore, because plaintiff's unjust-enrichment claim seeks to recover funds that plaintiff agreed HFV could retain, it plainly contravenes the terms of the refund addendum. Accordingly, the tender-back rule bars plaintiff's claim for unjust enrichment. See *Stefanac*, 435 Mich at 159. Again, the trial court correctly granted summary disposition of plaintiff's unjust-enrichment claim.

F. CIVIL CONSPIRACY

We also reject plaintiff's argument that the trial court erred by granting defendants summary disposition of his claim alleging civil conspiracy. Plaintiff

failed to adduce sufficient evidence of any separate actionable tort to survive summary disposition. See *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013). Moreover, to the extent that his claim for civil conspiracy is based on allegations that defendants failed to comply with contractual duties, the claim cannot proceed as a matter of law. See *id*. Finally, because the tender-back rule bars plaintiff from avoiding enforcement of the refund addendum, plaintiff cannot cite any damages arising from the alleged civil conspiracy, which is the "foundation" of any civil-conspiracy action. See *Fenestra, Inc v Gulf American Land Corp*, 377 Mich 565, 594; 141 NW2d 36 (1966). Accordingly, the trial court did not err by granting defendants summary disposition of the civil-conspiracy claim.

G. SUCCESSOR LIABILITY

Finally, plaintiff argues that the trial court erred by granting defendant Redwood-ERC summary disposition of plaintiff's "claim" of successor liability against it. Although "successor liability" is commonly described as a "claim," it is truly a theory of liability that depends on an underlying breach of a legal duty or commission of underlying wrongful conduct. See *Chase v Mich Tel Co*, 121 Mich 631, 637; 80 NW 717 (1899); *Stevens v McLouth Steel Prod Corp*, 433 Mich 365, 370-379; 446 NW2d 95 (1989); *Lemire v Garrard Drugs*, 95 Mich App 520, 524; 291 NW2d 103 (1980). Because summary disposition of all other claims was appropriately granted in favor of defendants, this issue is moot. See *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014) ("We generally do not address moot questions or declare legal principles that have no practical effect in a case."). Even presuming

that Redwood-ERC *could* be held liable for the acts and omissions of its predecessors under a theory of successor liability, because those predecessors were entitled to summary disposition, it necessarily follows that Redwood-ERC was also entitled to summary disposition.

IV. CONCLUSION

The trial court's grant of summary disposition in favor of all defendants is affirmed. Defendants, having prevailed in full, may tax costs. MCR 7.219(A).

MURRAY, C.J., and BORRELLO, J., concurred with RONAYNE KRAUSE, J.

HENRY FORD HEALTH SYSTEM v EVEREST NATIONAL INSURANCE COMPANY

Docket No. 341563. Submitted November 14, 2018, at Detroit. Decided November 20, 2018, at 9:00 a.m. Leave to appeal denied 505 Mich 974 (2020).

Henry Ford Health System brought an action in the Lapeer Circuit Court against Everest National Insurance Company, seeking to recover payment under the no-fault act, MCL 500.3101 *et seq*., for the healthcare services it provided to Jennifer Quinn. On July 30, 2016, Quinn was injured in a motor vehicle accident and at the time was insured by defendant. On July 31, 2016, Quinn assigned to plaintiff her right to pursue personal protection insurance (PIP) benefits under the no-fault act from defendant, even though the policy stated, "Interest in this Policy may not be assigned without [defendant's] written consent." Defendant moved for summary disposition, arguing that plaintiff's claim was barred because the insurance policy unambiguously precluded Quinn from assigning her right without defendant's consent and that because Quinn only assigned the portion of her claim related to plaintiff's bills, rather than her entire cause of action, the partial assignment was invalid. The court, Nick O. Holowka, J., granted the motion and dismissed plaintiff's complaint with prejudice, reasoning that the terms of the insurance contract—that is, the provision that prohibited Quinn from assigning her interest in the policy without defendant's written consent—barred plaintiff's complaint. Plaintiff appealed.

The Court of Appeals *held*:

1. Insurance policies are contracts, and in the absence of an applicable statute, they are subject to the same contract construction principles that apply to any other species of contract. Unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written; an ambiguous contract is one that is equally susceptible to more than a single meaning. As used in the insurance policy in this case, the term "interest" refers to both collective and distributive, or individual, rights. Therefore, the policy prohibited the assignment of any interest—that is, interest in the policy itself or

interest in specific benefits under the policy—without defendant's written consent. Contrary to defendant's argument, the provision unambiguously prohibited Quinn from assigning any interest without defendant's written consent, and the provision had to be enforced as written unless it violated law or a traditional defense to enforceability applied. Under *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich 182 (2018), a traditional defense to enforceability applied here—the clause violated public policy. *Shah* held that an antiassignment clause was not enforceable with regard to an accrued cause of action because public policy dictates that the clause cannot be enforced when the loss occurs before the assignment. Under *Shah*, the antiassignment clause in defendant's policy was therefore unenforceable as against public policy because it attempted to restrict Quinn's ability to assign her accrued claims.

2. Under MCL 500.3142(1), PIP benefits are payable as loss accrues, and under MCL 500.3142(2), those benefits are overdue if not paid within 30 days of receipt of reasonable proof of the fact and of the amount of loss sustained. As a result, the no-fault act contemplates that an insurer may discharge its obligation to the insured with respect to particular benefits that have been incurred by directing payment of those benefits to the party providing services covered by PIP benefits to the injured party. In *Schwartz v Tuchman*, 232 Mich 345 (1925), the Supreme Court held that the partial assignment of a cause of action was unenforceable against the debtor, in part because it imposed the burden of multiple creditors and performances on the defendant. *Schwartz* did not apply to this case because the no-fault act contemplates and requires a multitude of performances by the insurer through payments, while the debtor in *Schwartz* had no such performance requirements. Moreover, the *Schwartz* Court's common-law-based procedural distinctions between actions in law and equity were replaced by MCR 2.205, and to the extent that a proper disposition of the benefits sought by plaintiff required the presence of an additional party or parties, the MCR 2.205 joinder rules provided a method for maintaining a joint cause of action. Quinn correctly assigned to plaintiff her right to payment of past or presently due benefits; she did not assign any future PIP benefits that she may be entitled to recover as a result of the motor vehicle accident—the assignment of which is expressly forbidden by MCL 500.3143. Accordingly, Quinn's assignment to plaintiff was not unenforceable as a partial assignment.

3. Defendant waived appellate review of its claim that Quinn could not assign her right to payment of PIP benefits given that

she had not fully performed her obligations under the policy because it failed to support the claim with supporting authority.

Reversed and remanded.

Foster Swift Collins & Smith, PC (by *Paul J. Millenbach* and *Donshur L. Oliver*) for plaintiff.

Zausmer, August & Caldwell, PC (by *Amy S. Applin*, *James C. Wright*, and *A. Adam Post, II*) for defendant.

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

PER CURIAM. In this action for recovery of personal protection insurance (PIP) benefits payable under the no-fault act, MCL 500.3101 *et seq*., plaintiff, Henry Ford Health System, appeals as of right an order granting summary disposition in favor of defendant, Everest National Insurance Company. Because we agree that the trial court erred by enforcing an anti-assignment clause contained in defendant's insurance policy, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On July 30, 2016, Jennifer Quinn was involved in a motor vehicle accident. At the time of the accident, Quinn was insured under a no-fault insurance policy issued by defendant. Quinn received treatment from plaintiff, incurring medical expenses in excess of $200,000, which defendant refused to pay. On or about July 31, 2017, Quinn executed an assignment of rights, providing, in pertinent part, as follows:

This is an assignment of the right to enforce payment of charges incurred only for Services arising out of the July 30, 2016 accident, for which charges are payable under any policy of insurance, contract and/or statute. Such

> assignment shall include, in Assignee's sole discretion, the right to pursue appeal of a payment denial under any procedure outlined in any insurance policy, contract or statute and/or the right to file a lawsuit to enforce the payment of benefits due or past due for these Services incurred and resulting charges.

Plaintiff initiated this action the same day, seeking payment for services provided to Quinn.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the subject insurance policy unambiguously precluded Quinn from assigning her rights without defendant's consent. Defendant also asserted that because Quinn only assigned "the portion of her claim relating to [plaintiff]'s bills," rather than her entire cause of action, the partial assignment was invalid. Plaintiff opposed the motion on numerous grounds. Of significance to this appeal, plaintiff asserted that the purported antiassignment clause was ambiguous, unenforceable in the context of a postloss assignment of the right to payment for past or presently due benefits, and void pursuant to provisions of the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*., requiring that security interests in a healthcare-insurance receivable remain freely assignable.

The trial court ruled that plaintiff's complaint against defendant was barred under the terms of the insurance policy. The court reasoned that Quinn's failure to obtain defendant's written consent before assigning her rights triggered a separate clause of the policy that precluded suit against defendant in the absence of full compliance with the terms of the policy. The trial court also rejected plaintiff's contention that the antiassignment clause was invalid under the UCC because "[t]he assignee by operation of the statute is only a secured creditor who may assert rights to the

health-insurance receivable against the assignor or lower priority creditors, but not against the account debtor (in this case the insurer)." Accordingly, the trial court granted defendant's motion for summary disposition and dismissed plaintiff's complaint with prejudice.

II. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a summary disposition motion. *Robins v Garg (On Remand)*, 276 Mich App 351, 361; 741 NW2d 49 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 7; 792 NW2d 372 (2010) (quotation marks and citation omitted). Issues involving the proper interpretation of statutes and contracts are also reviewed de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012).

III. ANALYSIS

Plaintiff maintains on appeal that, acting as assignee of Quinn's claim, it was entitled to recover past and presently due benefits for the services it rendered to Quinn for her accident-related injuries. According to plaintiff, to the extent that the pertinent clause in defendant's insurance contract is construed as an antiassignment clause, it was inoperative to bar assignment of an accrued cause of action under Michigan law. We agree.

"Insurance policies are contracts and, in the absence of an applicable statute, are subject to the same contract construction principles that apply to any other

species of contract." *Id*. at 554 (quotation marks and citation omitted). Under traditional principles of contract construction, "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). A contract is ambiguous "if it is equally susceptible to more than a single meaning." *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40; 892 NW2d 794 (2017). Because the contract at issue involves mandatory PIP benefits required by the no-fault act, the contract and statutes must be "read and construed together as though the statutes were part of the contract . . . ." *Titan Ins Co*, 491 Mich at 554 (quotation marks and citation omitted).

The contractual provision at issue in this case states, in pertinent part, "Interest in this Policy may not be assigned without our [that is, defendant's] written consent." Plaintiff contends that this provision should be read as an antitransfer clause, prohibiting the insured from assigning the policy to someone else without consent, rather than a limitation on the insured's ability to assign an accrued right to recover under the policy. The policy does not define the term "interest." Thus, in determining the meaning of the word, it is appropriate to consult a dictionary. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515; 773 NW2d 758 (2009). Relevant to interpreting this provision, *Black's Law Dictionary* defines "interest" in both a "collective" and a "distributive" sense. "Collectively, the word includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity." *Black's Law Dictionary* (10th ed). Plain-

tiff's interpretation is too narrow in that it focuses solely on the first half of the definition, while ignoring the latter. Nor does the dual nature of the term leave it equally susceptible to more than one meaning. Instead, "interest" can only be reasonably understood as referring to both collective rights *and* "distributive" or individual rights. By using a broad term like "interest" in this provision, the policy should be reasonably construed as prohibiting assignment of *any* interest—that is, interest in the policy itself or interest in specific benefits arising under the policy—without written consent from defendant. Because we construe this provision as unambiguously prohibiting assignment of any interest without defendant's consent, we must enforce the provision as written unless it violates law or a traditional defense to enforceability applies. *Rory*, 473 Mich at 461.

Another panel of this Court recently considered the enforceability of an unambiguous antiassignment clause in a no-fault insurance policy in *Jawad A Shah, MD, PC v State Farm Mut Auto Ins C*o, 324 Mich App 182; 920 NW2d 148 (2018). In that case, the Court determined that resolution of this issue turned on application of precedent established in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), in which the Court declined to enforce an antiassignment clause when the assignment was made after a loss of insured property had occurred. *Shah*, 324 Mich App at 198-199. The *Shah* Court explained:

> Our Supreme Court in *Roger Williams* essentially held that an accrued cause of action may be freely assigned after the loss and that an antiassignment clause is not enforceable to restrict such an assignment because such a clause violates public policy in that situation. *Roger Williams*, 43 Mich at 254. In this case, [the insured] had an accrued claim against his insurer for payment of healthcare ser-

> vices that had already been provided by [the healthcare providers] before [the insured] executed the assignment. Under *Roger Williams*, the contractual prohibition against the [insured] assigning that claim to [the healthcare providers] was unenforceable because it was against public policy. *Id*.
>
> Therefore, we conclude that the antiassignment clause in the instant case is unenforceable to prohibit the assignment that occurred here—an assignment after the loss occurred of an accrued claim to payment—because such a prohibition of assignment violates Michigan public policy that is part of our common law as set forth by our Supreme Court. *Roger Williams*, 43 Mich at 254; *Rory*, 473 Mich at 469-471. [*Shah*, 324 Mich App at 200.]

The relevant circumstances presented in this case are identical to those at issue in *Shah*. That is, like the insured party in *Shah*, Quinn was injured in an automobile accident and received treatment that was alleged to fall within the scope of allowable expenses for which she could seek PIP benefits under the no-fault act. See *id*. at 186. After the services were rendered, Quinn assigned her right to payment for those services to her healthcare provider, despite an unambiguous antiassignment clause contained in the insurance policy. See *id*. at 187-188. Given the clear parallels between these cases, we are bound by the resolution of this very issue in *Shah*. MCR 7.215(J)(1).[1] Accordingly, we must conclude that the antiassignment clause in defendant's policy is unenforceable because it is contrary to public policy. See *Shah*, 324 Mich App at 200.

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[1] We recognize that our Supreme Court recently ordered oral argument on the insurance company's application for leave to appeal in that Court, directing it to brief "whether the anti-assignment clause in the defendant's insurance policy precludes the defendant's insured from assigning his right to recover no-fault personal protection insurance benefits to the plaintiff healthcare providers." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 503 Mich 882 (2018).

Defendant presents two additional arguments for affirming the trial court's ruling that were not addressed in *Shah*. First, defendant contends that Quinn could not assign her right to payment of PIP benefits because she had not fully performed her obligations under the policy. According to defendant, Quinn's "duties under the policy are ongoing" and her performance of "these ongoing obligations . . . is essential to [defendant]'s ability to review and consider claims." But apart from these vague references, defendant fails to identify what "ongoing" duties or obligations Quinn has concerning the claims she assigned to plaintiff. Therefore, we consider this argument abandoned because a party cannot simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (quotation marks and citation omitted).

Next, defendant argues that the assignment was unenforceable because it did not assign Quinn's entire cause of action for PIP benefits arising from the subject accident. Relying primarily on *Schwartz v Tuchman*, 232 Mich 345; 205 NW 140 (1925), defendant contends that a partial assignment of a cause of action is unenforceable against the debtor. In *Schwartz*, the plaintiff was assigned the right to receive one-third of the commission payable from a real estate transaction. *Id*. at 347-348. When the party responsible for payment of the commission failed to do so, the plaintiff sought to enforce the assignment in equity. *Id*. at 348. The trial court dismissed the action, concluding that the plaintiff had an adequate remedy at law against the real estate broker who had assigned the partial

commission to the plaintiff. *Id*. at 348-349. On appeal, the Supreme Court observed that although a partial assignment may be enforceable between the parties to the assignment, the assignee had no legal remedy against a debtor who was not a party to the assignment. *Id*. at 349. The Court explained:

> The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and subdivided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear. [*Id*. at 349-350 (quotation marks and citation omitted).]

However, the Supreme Court reasoned that these concerns did not arise in a court of equity, in which "the interests of all parties can be determined in a single suit" and "[t]he debtor can bring the entire fund into a court and run no risk as to its proper distribution." *Id*. at 350 (quotation marks and citation omitted). Thus, the Court concluded that "partial assignments should be sustained in a court of chancery in all cases where it can be done without detriment to the debtor or stakeholder, whenver [sic] equitable and just results may be accomplished by it." *Id*. (quotation marks and citation omitted).

Defendant's argument is unpersuasive because it ignores subsequent caselaw stating that "MCR 2.205 has replaced the common-law rule against splitting a cause of action." *United Servs Auto Ass'n v Nothelfer*,

195 Mich App 87, 89; 489 NW2d 150 (1992). Furthermore, defendant's position rests on the notion that Quinn's claim or cause of action is one for allegedly improper nonpayment of *all* no-fault benefits. We disagree.

This case is readily distinguishable from the circumstances presented in *Schwartz*, in which the defendant was obligated to make a single commission payment to a third party and the plaintiff sought to enforce an assignment of a fraction of that payment. *Schwartz*, 232 Mich at 347-348. As the Court explained in *Schwartz*, the partial assignment imposed the burden of multiple creditors and performances on the defendant—a burden that he did not bargain for when he entered into the contract. *Id*. at 349-350. In contrast, under the no-fault act, PIP benefits are payable as loss accrues, MCL 500.3142(1), and become overdue if not paid within 30 days of receipt of reasonable proof of the fact and of the amount of loss sustained, MCL 500.3142(2). In other words, the act contemplates and requires a multitude of performances (i.e., payments) by the insurer, such that the rationale for the limitation set forth in *Schwartz* has no application in the context of PIP benefits required by the no-fault act. In addition, the procedural distinctions between actions in law and equity as described in *Schwartz* have long been abolished in this state. See Const 1963, art 6, § 5; *Fenestra Inc v Gulf American Land Corp*, 377 Mich 565, 593; 141 NW2d 36 (1966). To the extent that a proper disposition of the benefits sought by the healthcare provider requires the presence of an additional party or parties, modern joinder rules provide a method for maintaining a joint cause of action. See *United Servs Auto Ass'n*, 195 Mich App at 89.

As further support for its contention that the assignment at issue in this case amounted to an unenforceable partial assignment of a cause of action, defendant cites various cases that discuss when an assignee is considered the real party in interest for purposes of bringing a cause of action in his or her own name. Specifically, in *Kearns v Mich Iron & Coke Co*, 340 Mich 577; 66 NW2d 230 (1954), the Court reiterated that Michigan jurisprudence has been "committed to the proposition that where an assignment is such that satisfaction of the judgment obtained by the assignee will discharge the defendant from his obligation to the assignor, for the purpose of the suit the assignee is the real party in interest and may maintain an action in his own name." *Id*. at 582, quoting *Sharrar v Wayne Savings Ass'n*, 254 Mich 456, 459; 236 NW 833 (1931). According to defendant, because Quinn only assigned her right to recover a limited portion of the allowable expenses potentially available under the no-fault act, the assignment would not relieve defendant of its obligation to Quinn for other benefits. Once again, defendant's argument rests on the mistaken presumption that Quinn's claim can only be viewed as one for all the PIP benefits that she may be entitled to recover as a result of her motor vehicle accident, which is inconsistent with the MCL 500.3142 requirement of prompt payment of claims as they accrue. Furthermore, MCL 500.3112 contemplates that an insurer may discharge its obligation to the insured with respect to particular benefits that have been incurred by directing payment of those benefits to the party providing services to the injured party. *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 209-210; 895 NW2d 490 (2017). See also MCL 500.3112 (stating that in the absence of written notice by another claiming entitlement to payment, "[p]ayment by

an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments . . . .").

This outcome—the ability of a healthcare provider who has provided services to a party injured in a motor vehicle accident to pursue recovery from the provider as the assignee of the injured party's claim—is further supported by the manner in which the no-fault act addresses assignments. MCL 500.3143 provides that "[a]n agreement for assignment of a right to benefits payable in the future is void." This provision is unambiguous and prohibits only assignments of benefits payable in the future, as opposed to a right to payment of past or presently due benefits. *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998). See also *Shah*, 324 Mich App at 216 (SHAPIRO, J., concurring in part and dissenting in part) ("By not including past-due benefits in this statutory prohibition, the Legislature, under the doctrine of *expressio unius est exclusio alterius*, made clear its intent to adhere to the fundamental principle that assignments of past-due benefits are effective and proper."). If this Court were to hold that the assignment at issue in this case was an unenforceable partial assignment, it would effectively render the insured's right to assign a claim for past or presently due benefits meaningless.

IV. CONCLUSION

In sum, consistently with this Court's recent ruling in *Shah*, we conclude that the antiassignment clause in defendant's insurance policy is unenforceable because it is against public policy to the extent that it attempts to restrict the insured's ability to assign an

accrued claim. We further conclude that Quinn's assignment to plaintiff was not unenforceable as a "partial assignment." We reverse the trial court's order granting defendant's motion for summary disposition and remand for further proceedings consistent with this opinion.[2] We do not retain jurisdiction.

O'BRIEN, P.J., and TUKEL and LETICA, JJ., concurred.

[2] Given our resolution of this issue, we will not address plaintiff's alternative argument concerning the enforceability of the antiassignment clause under MCL 440.9408.

PEOPLE v FELTON

Docket No. 339589. Submitted July 12, 2018, at Lansing. Decided October 2, 2018. Approved for publication November 20, 2018, at 9:05 a.m.

Farrin L. Felton was convicted after a jury trial in the Kalkaska Circuit Court of two counts of possession with intent to deliver less than 50 grams of a controlled substance (cocaine and heroin), MCL 333.7401(2)(a)(*iv*), second or subsequent offense, MCL 333.7413(2), after the police pulled over and searched a car in which he was a passenger and discovered that the driver, Gary Johnson, was in possession of illegal drugs. Johnson agreed to testify against defendant at trial in exchange for a plea deal. The day before trial, the court, George J. Mertz, J., held a hearing to determine whether the prosecution would be allowed to introduce evidence of other acts under MRE 404(b) through the testimony of Scott Blackwell, a retired narcotics detective, and Dylan Caswell, an illegal-drug user, over defense objections that the proposed testimony would not be substantively admissible under MRE 404(b)(1) and that the prosecution had not given timely notice as required by MRE 404(b)(2). The court ruled that the prosecution had given good cause for the untimely notice and that the proposed testimony was admissible to show a common scheme or plan. At trial, Blackwell testified that, in 2013, acting on a tip from a confidential informant that defendant was selling drugs in Macomb County, Blackwell made contact with and recovered narcotics from defendant, who was in a vehicle that he did not own and was not driving. Caswell testified that a few days before the events of the instant case, he had asked Johnson for drugs and Johnson told him about a house where he could obtain them. He then went to the house, where he purchased crack cocaine from defendant. The jury found defendant guilty, and he was sentenced to concurrent terms of 3 to 30 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. The court erred by ruling that the evidence was admissible despite the prosecution's untimely notice. Under MRE 404(b)(2), evidence of other crimes, wrongs, or acts may not be admitted

unless the prosecution provides written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown. It was undisputed that written notice was not timely provided to defendant and that oral notice on the record was not provided until one day before trial. To determine whether there was good cause to excuse the noncompliance, courts consider the three purposes underlying the rule: to promote reliable decision-making, to prevent unfair surprise, and to offer the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice. In this case, the late notice did unfairly surprise defendant and did not provide him with time to marshal arguments regarding both relevancy and unfair prejudice. Defense counsel was not aware of the other-acts testimony to be offered by Blackwell until 12 days before trial, and he was unaware of the content of Caswell's testimony until it was described at the hearing the day before trial, as defense counsel explained at the hearing. With respect to Blackwell, it was undisputed that the prosecution was aware of the 2013 crime at the time the information was filed, and there was no basis on the record to conclude that over a six-month period, the prosecution, with reasonable diligence, could not have obtained the report of the crime from either the police or the prosecutor's office. Further, the prosecution conceded that no other efforts were made to obtain Blackwell's address or other contact information until the day the MRE 404(b) notice was filed. Similarly, the prosecution did not show good cause for failing to file an MRE 404(b) notice as to Caswell. Although the prosecution argued that it had been unable to interview Caswell until June 7, 2017, when he pleaded guilty in his drug case, Caswell had been permitted to plead to a possession-only charge in exchange for cooperating with law enforcement, which strongly suggested that the prosecution was aware of his potential testimony at an earlier time. Further, the prosecution failed to indicate that Caswell's testimony would concern other-acts evidence until four days before trial, and the substance of that testimony was not actually articulated until the hearing the day before trial. In ruling that the prosecution had shown adequate good cause under these circumstances, the court improperly put the burden on defendant to produce evidence while it accepted the prosecutor's statements, which were unsupported by any evidence, as conclusive. Accordingly, the other-acts evidence was procedurally inadmissible.

2. The trial court abused its discretion by admitting the testimony of Caswell and Blackwell because the other acts they

described were dissimilar to the charged offense and the evidence was unfairly prejudicial. Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, although it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. For other-acts evidence to be admissible, the prosecutor must offer the evidence under something other than a character or propensity theory, the evidence must be relevant under MRE 402 as enforced through MRE 104(b), and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. With respect to the other-acts testimony from Blackwell, the mere fact that defendant possessed drugs in a vehicle driven by someone else was not sufficient to establish a common plan or scheme. Similarly, while the testimony of Caswell supported a conclusion that defendant was a drug dealer with contacts in southern Michigan, it did not demonstrate a common plan or scheme in relation to the instant charges. The overwhelming effect of the other-acts testimony in this case was to imply that because defendant sold drugs in the past, he was acting in conformity with that propensity in this case, which is precisely the inference forbidden under MRE 404(b). The probative value of the other-acts evidence was substantially outweighed by unfair prejudice to defendant.

3. The erroneous admission of the other-acts evidence was not harmless. Harmless-error review focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. Without the improperly admitted testimony, the case against defendant rested exclusively on the testimony of Johnson. That testimony was self-serving, and Johnson's credibility was far from sterling given his initial statement to the police that he did not have drugs in his possession only to have them found later at the police station. Given the closeness of the properly admitted evidence and the substantial danger posed by character evidence to the trial process, the error required reversal.

Convictions reversed; case remanded for further proceedings.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Scott R. Shimkus*, Assistant Attorney General, for the people.

Michael A. Faraone PC (by *Michael A. Faraone*) for defendant.

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. Following a jury trial, defendant was convicted of two counts of possession with intent to deliver less than 50 grams of a controlled substance (cocaine and heroin), MCL 333.7401(2)(a)(*iv*), second or subsequent offense, MCL 333.7413(2). He was sentenced to concurrent terms of 3 to 30 years in prison. Defendant appeals, challenging the admission under MRE 404(b) of other-acts evidence at trial and the scoring of Offense Variable (OV) 14. For the reasons set forth below, we conclude that the trial court erred by admitting the other-acts evidence and, because the error was not harmless, we reverse defendant's convictions and remand the case for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The police received a tip that an older GM sedan, carrying three individuals, would be transporting drugs into the county. The informant, who did not testify, also notified the police that the individuals in the vehicle would be a white man, a white woman, and a black man. When the vehicle was spotted, Deputy Paul Belanger initiated a traffic stop. The three individuals were identified as Gary Johnson (a white man), Darlene Keaton[1] (a white woman), and defendant (a black man). Johnson was driving, Keaton was in the front passenger seat, and defendant was in the backseat. Keaton, who owned the car, gave consent for a drug-sniffing dog to search the vehicle. Although the

[1] Darlene Keaton's name also appears as "Keeton" in the lower court record.

dog indicated at the center console, a search revealed no drugs in the vehicle. The police arrested Johnson for driving on a suspended license. After Johnson was transported to jail, he was searched, and jail personnel found a paper bag in his underwear. The bag contained several small baggies, some containing cocaine and some containing heroin.[2]

Johnson was originally charged with two counts of possession with intent to deliver less than 50 grams, a 20-year offense. He agreed to testify against defendant in exchange for a reduction in those charges to simple possession and sentencing under MCL 333.7411 such that upon successful completion of a term of probation, the charges against him would be dismissed without an adjudication of guilt.

At trial, Johnson testified that he was an opiate addict and that he agreed to work with defendant to sell heroin and crack in Kalkaska in exchange for drugs. According to Johnson, he met defendant in Detroit, where defendant obtained the drugs, and they returned together to Kalkaska to sell them. Johnson testified that his role was to line up potential buyers because defendant did not know anyone in the area. He stated that the drugs were found on him rather than defendant because when they passed a state trooper and a truck pulled up behind them, defendant passed him the drugs to hide and he put them in his underwear.

Defendant testified in his own defense. He stated that the only reason he was in the vehicle on the night in question was because he had asked Johnson to "get me away from the city." He maintained that he did not know that there were drugs in the vehicle and that Johnson's testimony was a lie.

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[2] Although the timing is not clear from the record, the police also discovered that Keaton was in possession of a crack pipe.

Over defendant's objection, the trial court allowed the prosecution to introduce other-acts evidence through the testimony of two witnesses: Scott Blackwell, a retired narcotics detective, and Dylan Caswell, an illegal-drug user. They testified to separate events.

Blackwell testified to an incident that occurred in August of 2013. According to Blackwell, a confidential informant told him that defendant was selling drugs in Macomb County, specifically in Chesterfield Township. Blackwell made contact with defendant and recovered narcotics from him. He testified that when this occurred, defendant was in a vehicle that he did not own and that he was not driving. According to Blackwell, defendant admitted that he was distributing drugs in the Chesterfield area.[3]

Caswell testified that a few days before the events of the instant case, he had purchased drugs from defendant. He testified that he had asked Johnson for drugs and that Johnson had told him about a house where he could obtain them. He then went to the house, where he purchased crack cocaine from defendant. According to Caswell, defendant told him that the crack was from "[d]ownstate."[4]

Whether Caswell and Blackwell should be permitted to testify was the subject of a hearing the day before trial. Defendant argued that the prosecution had failed to give timely notice as required by MRE 404(b)(2) and that the testimony did not meet the substantive require-

[3] Defendant's conviction by plea arising out of this arrest was not introduced.

[4] Defendant testified that he had never met Caswell and did not know him. He stated that he was not in Kalkaska County on the day Caswell testified that he was. Defendant testified that the last time he went to Kalkaska was in June 2016. When asked why Johnson's and Caswell's stories matched up, defendant opined that the two men had talked and aligned their stories about him.

ments of MRE 404(b)(1), which governs the admissibility of evidence of other crimes, wrongs, or acts.

Defendant was charged on January 17, 2017. Trial was scheduled for June 20, 2017. The scheduling order set a final pretrial conference for June 6, 2017, and ordered that "trial counsel shall have provided the following to the Court and opposing counsel **prior** to the conference: . . . Final witness and exhibit lists." The prosecution filed a timely witness list, but neither Caswell nor Blackwell was on it. At the June 6, 2017 final pretrial conference, the prosecution gave no indication that it intended to amend its witness list or to seek admission of MRE 404 evidence.

Two days later, on June 8, 2017, 12 days before trial, the prosecution filed an amended witness list adding Blackwell and Caswell, and also filed a notice of intent to introduce MRE 404(b) evidence through Blackwell. The notice of intent did not refer to Caswell or the nature of his testimony. On June 16, 2017, defendant served an objection to the notice of intent and a motion to strike Caswell from the witness list.[5] On the same day, the prosecution filed a response in which, for the first time, it indicated that Caswell's testimony would constitute MRE 404(b) evidence.

The court heard arguments on June 19, 2017, the day before trial. The prosecution argued that good cause for late notice existed because (a) it took multiple phone calls to reach Blackwell because he had retired from the sheriff's department, and (b) Caswell was not available to be interviewed until after his own sentencing on June 6, 2017, for a drug conviction. The defense responded that Blackwell's intended testimony concerned

[5] Actually, defendant filed a "notice of intent to strike proposed witness, Dylan Caswell," rather than a motion, because the motion deadline had passed.

a four-year-old prior conviction for a drug sale, a conviction that was known to the prosecution at the outset of this case as demonstrated by the fact that it was included in the information as the basis for the second-offender charge. As to Caswell, defense counsel stated that even as of the day before trial, he had not been provided with the police report concerning Caswell. He also argued that the prosecution's explanation that Caswell would not speak with the prosecution until after his sentencing was "disingenuous because much like every other plea that's related to a drug-related crime, most times it's part of a proffer wherein they can talk to the defendant about whatever it is that [he] may or may not know about . . . . That's usually how it works in terms of working on a resolution. You are interviewed by the police. You tell them whatever information it is that you had."

At the close of the hearing, the trial court ruled:

> For the reasons stated by the Prosecutor, and based on the lack of any evidence to the contrary, the Court finds that these are circumstances which the Prosecutor has discovered since the expiration of [the deadlines], and that the People raised them as an issue as soon as they could after discovering the grounds for testimony of both of these witnesses, as well as for adding Mr. Caswell as a witness in the first place.

The trial court also ruled that the testimony of Blackwell and Caswell met the substantive requirements of MRE 404(b) because their testimony would be relevant to

> a common scheme or plan in carrying out these transactions . . . [i]n light of the defense that [defendant] was simply in the car during this incident and not part of any drug transaction . . . . And I think the testimony of both of these witnesses goes to a material issue and it's likely to be probative on that issue of whether or not he has, in the

> past, conducted transactions for sales of drugs in a similar way under similar circumstances.

The court concluded that the testimony was not unduly prejudicial so as to require exclusion under MRE 403 and stated that it would provide a limiting instruction to the jury before each witness testified and in final instructions.

II. STANDARD OF REVIEW

Our review is governed by the following standard:

> A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion. However, whether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo. A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. [*People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017) (citations omitted).]

III. ADMISSION OF OTHER-ACTS EVIDENCE UNDER MRE 404(b)

A. PROCEDURAL REQUIREMENTS—MRE 404(b)(2)

Before being allowed to introduce evidence of other acts under MRE 404(b), the prosecution must provide timely notice to the defense as defined by MRE 404(b)(2). Evidence of other acts may not be admitted unless the prosecution "provide[s] written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown . . . ."[6]

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[6] MRE 404(b)(2) reads in full:

> The prosecution in a criminal case shall provide written notice at least 14 days in advance of trial, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial

It is undisputed that "written notice" was not timely provided to defendant and that "oral notice on the record" was not provided until one day before trial. The question then is whether the trial court erred by admitting the evidence despite the untimely notice, i.e., whether there was good cause to excuse the noncompliance.

As the Supreme Court stated in *People v Jackson*, 498 Mich 246, 261; 869 NW2d 253 (2015), there are three underlying purposes of the rule that we should consider when reviewing a claim of good cause for a failure to comply with the rule:

> Requiring the prosecution to give "pretrial notice of its intent to introduce other acts evidence at trial" is designed to "promote[] reliable decision making," to "prevent[] unfair surprise," and to "offer[] the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice." [Citations omitted.]

It is clear that the late notice in this case did "unfair[ly] surprise" defendant and did not provide him with time to "marshal arguments regarding both relevancy and unfair prejudice."[7] Defense counsel was not aware of the other-acts testimony to be offered by Blackwell until 12 days before trial, and he was unaware of the content of Caswell's testimony until it was described at the hearing the day before trial. Defense counsel fairly stated the problem at that hearing when he told the court:

> and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

[7] For the reasons set forth in our discussion of MRE 404(b)(1), we conclude that the evidence in question did not promote reliable decision-making and even if it did to some degree, the circumstances of the other two factors require exclusion.

> So it just blows my mind that we're going to have a trial tomorrow and all of these things are coming up when we have all this time to set up whatever your case is going to be. And now I have to consider these other things when I'm more concerned about the facts that were in front of me before, and now they're just trying to add all these other things . . . .

As to Blackwell, the trial court concluded that the claimed difficulty in contacting Blackwell sufficed. We disagree. First, as defense counsel argued below, the other act in question was a drug offense committed in August 2013, and it is undisputed that the prosecution was aware of defendant's conviction for that crime at the time the information was filed. Therefore, the prosecution's statement at the hearing that "we did not know [the other-acts evidence] existed" holds no weight and appears to have been hyperbole. Moreover, the prosecution's claim that it did not have the police report from the 2013 crime until the day before it filed the notice required by MRE 404(b) is not adequate to show good cause. The prosecution argued that it tried to obtain the report by calling the relevant police department in early June 2017 and that it took many calls to get a response. However, no efforts were made during the six months between the filing of the information and defendant's trial on June 20, 2017. There is no basis on the record to conclude that over a six-month period, the prosecution, with reasonable diligence, could not have obtained the report from either the Macomb County police or the Macomb County prosecutor's office. The same is true as to the whereabouts of Blackwell. The prosecution suggested that because Blackwell was retired, the police department he served in no longer had his telephone number. However, it conceded that no other efforts were made to obtain his address or other contact information until the day the MRE 404(b) notice

was filed.[8] Moreover, knowledge of Blackwell's whereabouts was not a prerequisite to filing a 404(b) notice. If after filing the notice Blackwell could not be located, the prosecution could simply forgo calling him as a witness.

Similarly, the prosecution did not show good cause for failing to file a 404(b) notice as to Caswell. The prosecution argued that it could not have done so because it had been unable to interview Caswell until June 7, 2017, when he pleaded guilty in his drug case. Caswell was charged in January 2017 with conspiracy to deliver heroin under 50 grams, illegal use and sale of a financial transaction device, and driving without insurance. However, he was permitted to plead to a possession-only charge with sentencing under MCL 333.7411 in exchange for cooperating with law enforcement, which strongly suggests that the prosecution was aware of his potential testimony at an earlier time. Even assuming that the prosecution did not learn that Caswell could provide useful testimony until the day before the prosecution added him to the witness list, it failed to indicate that his testimony would concern other acts. The first time the prosecution advised the defense that Caswell would provide other-acts evidence was on Friday, June 16, 2017, four days before trial with an intervening weekend, and the substance of that testimony was not actually articulated until the hearing the day before trial. A basis for defense counsel's objection to the addition of Caswell as a witness was that Caswell was not a witness to anything concerning the events of defendant's arrest, that he "was not present at the time

[8] As defense counsel argued at the hearing, "I find that [explanation] to be highly problematic, especially considering [that the witness is] involved with law enforcement, and you have the entire Kalkaska County Sherriff's [sic] Office and [Michigan State Police] at your disposal, why you're unable to obtain a report is very questionable to me or how that takes so long."

of the stop or arrest," and that "[t]he police reports, the complaint, [and] information . . . are devoid of any reference to Dylan Caswell." It was only in response to this objection that the prosecution explained the general content of Caswell's expected testimony, i.e., that it was 404(b) evidence of a separate drug sale.

The prosecution provided a second explanation, i.e., that it had not known that it needed Caswell's testimony because it had another witness who would have offered that testimony, but who could not be located. This argument carries little weight given that no 404(b) notice was ever filed for this witness either.

The trial court's error may have resulted from its confusion about which party had the burden to establish that admission was proper. The court stated:

> For the reasons stated by the Prosecutor, and based on the lack of any evidence to the contrary, the Court finds that these are circumstances which the Prosecutor has discovered since the expiration [of the 404(b) notice deadline] and that the People raised them as an issue as soon as they could after discovering the grounds for testimony.

In so reasoning, the court improperly put the burden on defendant to produce evidence while it accepted the prosecutor's statements—which were wholly unsupported by any evidence—as conclusive. This is of particular concern given the fact that the defense was only alerted to the need to look into the other-acts evidence a few days before and had still not been provided with the 2013 police report, a document the prosecution had six months to locate. Accordingly, we conclude that the other-acts evidence was procedurally inadmissible.

B. SUBSTANTIVE REQUIREMENT

Defendant next argues that the trial court abused its discretion by admitting the testimony of Caswell

and Blackwell because the other acts they described were dissimilar to the charged offense and because this evidence was unfairly prejudicial. We agree.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

It is a "deeply rooted and unwavering principle that other-acts evidence is inadmissible for propensity purposes." *Denson*, 500 Mich at 397. "This rule reflects the fear that a jury will convict a defendant on the basis of his or her allegedly bad character rather than because he or she is guilty beyond a reasonable doubt of the crimes charged." *Id*. Admission of other-acts evidence involves four considerations:

> First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), quoting *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).]

According to the Supreme Court:

> [A] common pitfall in MRE 404(b) cases is that trial courts tend to admit other-acts evidence merely because the proponent had articulated a permissible purpose. The mechanical recitation of a permissible purpose, without

> explaining how the evidence relates to the recited purpose[], is insufficient to justify admission under MRE 404(b). It is incumbent on a trial court to vigilantly weed out character evidence that is disguised as something else. In other words, merely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue and does not automatically render the evidence admissible. Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence under the second prong of the *VanderVliet* test. [*Denson*, 500 Mich at 400 (quotation marks and citations omitted).]

Thus, the prosecution "bears the burden of establishing" "a proper noncharacter purpose for the admission of the other-acts evidence." *Denson*, 500 Mich at 398. "MRE 404(b) prohibits the admission of other-acts evidence when the prosecution's only theory of relevance is that the other act demonstrates the defendant's inclination for wrongdoing in general and thus indicates that the defendant committed the conduct in question." *Id*. Other-acts evidence may be admissible when "the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Mere similarity between the other-acts evidence and the charged conduct is not sufficient; rather, "the effort is to establish a definite prior design or system which included the doing of the act charged as part of its consummation." *Id*. at 64 (quotation marks and citation omitted).

The other-acts testimony from Blackwell did not define a definite design or system. The June 8, 2017 notice of 404(b) evidence stated that Blackwell would testify about a prior incident in which defendant

"A. Was in possession of heroin. B. Was selling it to other individuals. [and] C. Utilized a separate individual and their vehicle to drive him around and assist him with the sale of illegal drugs." The first two reasons are clearly insufficient as they amount to nothing more than propensity evidence, i.e., implying that because defendant sold drugs before, he likely was selling them now.

The third factor was not established. Blackwell testified that in 2013, he arranged a controlled buy from defendant and found that defendant had crack cocaine. According to Blackwell, defendant was in a car owned and driven by someone else. There was no evidence that the driver was involved in recruiting buyers or doing anything other than driving.[9] The mere fact that defendant possessed drugs in a vehicle driven by someone else is not sufficient to establish a common plan or scheme. First, being a passenger in a car owned by another is so commonplace and indistinctive that it fails to demonstrate a common scheme. See *Sabin (After Remand)*, 463 Mich at 64-65 (requiring "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations") (quotation marks, citation, and emphasis omitted). Second, in the incident described by Blackwell, defendant had the drugs on his person and admitted that they were his, a fact that supports, if anything, the notion that defendant did not have a practice of having others carry his drugs. The incidents are also inconsistent in that the 2013 case involved

[9] In his opening statement, the prosecutor told the jury that the 2013 incident involved defendant using the driver "to hook him up with people who needed heroin in the area." However, no evidence supported that claim.

selling drugs directly out of a vehicle and occurred much nearer to defendant's home.[10]

A common scheme or plan was also not established as to the testimony of Caswell. He testified that a few days before the events in this case, he had asked Johnson for drugs, and Johnson gave him the address of a house where he could obtain them. Caswell stated that he went to the house and purchased drugs from defendant, who told him that the drugs were from downstate. This evidence supported the conclusion that defendant was a drug dealer with contacts in southern Michigan, but it did not demonstrate a common plan or scheme in relation to the instant charges. Notably, Caswell did not testify that defendant had a third party carrying the drugs or that Johnson was present or that a vehicle was involved; to the contrary, he testified that defendant was in possession of the drugs and sold them to him directly.[11] In addition, Caswell testified that he approached Johnson and asked where he could purchase drugs; there is no evidence that Johnson sought Caswell out in order to solicit sales. Moreover, the testimony does not indicate that Johnson accompanied Caswell when he went to purchase the drugs or that he took any other action to facilitate the transaction.

The overwhelming effect of the other-acts testimony in this case was the inference that defendant had a propensity for distributing drugs, i.e., that because

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[10] The prosecution argues that the fact that the 2013 incident occurred outside Wayne County, defendant's county of residence, shows a pattern consistent with the instant case. However, the 2013 incident occurred in Macomb County, a county adjacent to Wayne, and so has little connection to the claim here that defendant traveled all the way to Kalkaska in order to find customers.

[11] There is nothing in the record to suggest that defendant was charged in connection with the alleged sale to Caswell.

defendant sold drugs in the past, he was acting in conformity with that propensity when he was in the car with Johnson, who had drugs in his possession. This is precisely the inference forbidden under MRE 404(b). Thus, the probative value of the other-acts evidence was substantially outweighed by unfair prejudice to defendant. The prosecution's case, based only on the facts concerning the instant charge, was far from compelling: drugs were not found on defendant's person, and Johnson—the sole witness who supported the prosecution's theory—was subject to impeachment given that he had received a highly favorable plea deal in exchange for his testimony. However, by showing the jury that defendant had been involved in drug sales several times before, the jury could conclude, on that basis, that he was very likely to have been guilty even though he had no drugs in his possession when arrested. The prosecution used the other-acts evidence to argue that defendant was guilty in this case because he had sold drugs in the past. Specifically, the prosecutor argued in closing:

> How do we know that he was mixed up in that kind of stuff? Aside from the evidence you heard up here. Oh, wait, he sold the exact same drugs [to Blackwell] a few years before. The exact same drugs. Clearly, he has a method of getting them. He got them before. Clearly, he has an in with somebody who can provide these drugs. Gary Johnson testified to all of this, and that testimony was confirmed by Dylan Caswell. What did the Defendant do with the illegal drugs just days before the arrest in this case was made? He sold them [to Caswell].

In explaining why Johnson and another prosecution witness got plea deals while defendant did not, the prosecutor also implied that the real possessor of the drugs was defendant rather than Johnson or Keaton by stating: "Do they have a lengthy criminal history?

Have they sold drugs before? No. Has the Defendant? Yes, he has." This is plainly an appeal for the jury to consider the other-acts testimony for propensity purposes. The prosecutor also referred to Blackwell's testimony, stating, "[W]e brought a detective from downstate who said he sold these same drugs in the past, the common scheme." Again, he also stated, when addressing the fact that no drugs were found on defendant, "Oh, wait, he sold the exact same drugs a few years before. The exact same drugs. Clearly, he has a method of getting them. He got them before." We decline to find that the similarity of the drugs sold, unless of some unusual or unique type, constitutes a common scheme for purposes of MRE 404(b). Sadly, heroin and cocaine are neither unique nor unusual street drugs, nor are they in fact, as the prosecutor repeatedly represented to the jury, "the same."

The prosecution's argument directed the jury to improperly consider the other-acts evidence and from that evidence the jury could readily conclude that because defendant had sold drugs on two prior occasions, he was a drug dealer, and therefore, likely to have been in possession of the drugs even though the drugs were found hidden in Johnson's underwear.

For these reasons, we conclude that the other-acts evidence was substantively inadmissible.

C. HARMLESS ERROR

Having concluded that the introduction of the other-acts evidence in this case was procedurally and substantively erroneous, we must consider whether the error was harmless. In applying the harmless-error review, "[w]e focus[] on the nature of the error and assess[] its effect in light of the weight and strength of the untainted evidence." *Denson*, 500 Mich at 409.

Without the improperly admitted testimony, the case against defendant rested exclusively on the testimony of Johnson. That testimony was self-serving, and Johnson's credibility was far from sterling given his initial statement to the police that he did not have drugs in his possession only to have them found later at the police station.

As noted by the Supreme Court, "other-acts evidence carries with it a high risk of confusion and misuse. When a defendant's subjective character [is used] as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence." *Denson*, 500 Mich at 410 (quotation marks and citations omitted). The Court went on to state that when such evidence is admitted, "[t]he risk is severe that the jury will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he did it before he probably did it again." *Id*. (quotation marks and citation omitted). As described in *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988), character evidence

> presents three types of impropriety. First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged. All three of these dimensions suggest a likelihood that innocent persons may be convicted. [Citation omitted.]

Given the closeness of the properly admitted evidence and the "substantial danger" posed by character evidence to the trial process, we conclude that the error in this case was not harmless.[12]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

STEPHENS, P.J., and GADOLA, J., concurred with SHAPIRO, J.

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[12] Because of our decision, we need not reach defendant's claim of sentencing error.

PETERSEN FINANCIAL LLC v CITY OF KENTWOOD

Docket No. 339399. Submitted November 8, 2018, at Grand Rapids. Decided November 20, 2018, at 9:10 a.m.

Petersen Financial LLC brought an action in the Kent Circuit Court against the city of Kentwood and the Kent County Treasurer, alleging that under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., its purchase of real property at a tax foreclosure sale was free and clear from all liens except any future installments of special assessments and that all previously owed special assessment installments were extinguished by the judgment of foreclosure. The city had entered into the special assessment agreements starting in 2004, and the agreements indicated that the contractual obligations constituted covenants that ran with the land and bound all successors in title. The previous property owner failed to pay the special assessments, which led to the tax foreclosure sale, at which plaintiff purchased the property. Plaintiff maintained that the judgment of foreclosure extinguished all special assessments connected to the property and alleged four counts in its complaint. Four of the five counts sought declaratory relief regarding three of the special assessment agreements, plus an amended version of one of those agreements, the voluntary special assessment/development agreement (VSADA). The fifth count alleged slander of title predicated on special assessment liens and demands for payment that effectively clouded title. Both parties moved for summary disposition, and the court, George J. Quist, J., held that with respect to the first four counts, plaintiff was challenging the nature and imposition of the special assessments and therefore the circuit court lacked subject-matter jurisdiction because the Michigan Tax Tribunal (the MTT) had exclusive jurisdiction over those counts. With regard to the fifth count, the court ruled that the claim constituted a tort that was covered by governmental immunity and that none of the statutory exceptions to immunity applied. Accordingly, the court denied plaintiff's motion for summary disposition and granted defendants' motion. Plaintiff appealed.

The Court of Appeals *held*:

MCL 600.605 provides that circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the Constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the Constitution or statutes of this state. MCL 205.731(a) provides that the MTT has exclusive and original jurisdiction over a proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization under the property tax laws of this state. The MTT's expertise chiefly relates to questions concerning factual underpinnings of taxes. In this case, the particular allegations in Counts I through III of plaintiff's complaint squarely presented a legal question regarding the effect of a tax foreclosure judgment on overdue special assessment installment payments; it was a pure issue of statutory construction. Plaintiff was not challenging the factual basis or the amount of the underlying assessments arising from the special assessment agreements; rather, plaintiff took issue with the continuing enforceability of the assessments, at least in regard to outstanding past-due installments, in light of the tax foreclosure, arguing that past debt was extinguished by the judgment of foreclosure. Therefore, the proceedings, as framed by plaintiff's complaint, did not entail plaintiff seeking direct review of a final decision, finding, ruling, or determination by the city relating to special assessments under the property tax laws of this state. Instead, plaintiff sought review of various GPTA foreclosure provisions and application of those provisions to the existing factual circumstances, which was not within the wheelhouse of the MTT's expertise. Accordingly, Counts I through III did not trigger the MTT's original and exclusive jurisdiction. Because defendants did not seek to hold plaintiff accountable for any amounts under the deferred-assessment agreement plaintiff addressed in Count I and the landscape/irrigation agreement challenged in Count III, plaintiff was entitled to declaratory relief on those two counts. With respect to Counts II and IV, which concerned the VSADA and amended VSADA, the circuit court had subject-matter jurisdiction over those counts because the counts effectively alleged the creation or existence of a legally invalid contract that gave rise to a special assessment or the extension of a special assessment, resulting in an encumbrance on plaintiff's property. Accordingly, the legal validity of the amended VSADA had to be addressed and resolved on remand. Finally, with respect to Count V, MCL 691.1407(1) provides governmental immunity from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental

function, and MCL 691.1401(b) defines "governmental function" as an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. In this case, plaintiff's argument—that defendants were not engaged in the exercise or discharge of a governmental function when attempting to collect an extinguished obligation—lacked merit because it failed to appreciate the difference between having the authority to generally engage in a particular governmental function and the negligent, improper, or wrongful performance of the authorized function. The improper performance of an activity authorized by law is, regardless of the impropriety, still authorized for purposes of the governmental-function test. The Kentwood Code of Ordinances authorized the city to impose special assessments and create liens relative to special assessments; therefore, the city was plainly engaged in the exercise and discharge of a governmental function for purposes of MCL 691.1407(1) and governmental immunity with respect to the special assessments at issue, their collection, and the resulting recorded liens. Accordingly, plaintiff did not establish that the circuit court erred by summarily dismissing its claim for slander of title.

Affirmed in part, and reversed and remanded in part for further proceedings.

Visser and Associates, PLLC (by *Donald R. Visser*) for Petersen Financial LLC.

Plunkett Cooney (by *Josephine A. DeLorenzo* and *David K. Otis*) for the city of Kentwood.

Linda S. Howell and *Sangeeta Ghosh* for the Kent County Treasurer.

Before: MURPHY, P.J., and O'CONNELL and BECKERING, JJ.

MURPHY, P.J. Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendants, the city of Kentwood (the city) and the Kent County Treasurer (the county treasurer), in this action involving claims related to the effect of tax

foreclosure proceedings on special assessment agreements entered into by the city, which assessments were payable in installments and had encumbered real property purchased by plaintiff at a tax foreclosure sale. Plaintiff maintained that the judgment of foreclosure extinguished all special assessments connected to the property. The circuit court determined that it lacked subject-matter jurisdiction with respect to four of the five counts in plaintiff's complaint, which sought declaratory relief regarding three of the underlying special assessment agreements, plus an amended version of one of those agreements. The court found that the Michigan Tax Tribunal (the MTT) had exclusive jurisdiction over those four counts. The circuit court also summarily dismissed the fifth count of plaintiff's complaint that alleged slander of title predicated on special assessment liens and demands for payment that effectively clouded title. The court concluded that the city and the county treasurer were shielded by governmental immunity on the slander-of-title claim. We hold that the four counts dismissed for lack of subject-matter jurisdiction were within the jurisdiction of the circuit court, not the MTT, because they did not implicate the MTT's fact-finding purpose and expertise but solely presented questions of law. And, for reasons elaborated on later in this opinion, we remand for entry of an order providing plaintiff with declaratory relief on two of the counts and for further proceedings on the remaining two counts.[1] We further hold that plaintiff's argument that the circuit court erred by dismissing the slander-of-title count on the basis of governmental immunity is unavailing. Accordingly, we affirm in part and reverse and remand in part.

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[1] The latter two counts ultimately concern the single question regarding the enforceability of the special assessment arising out of the amended version of one of the special assessment agreements.

This case concerns real property located within the city. Starting in 2004, the city and the property owner, along with others, entered into various special assessment agreements relative to several infrastructure improvements that were to benefit the property for purposes of a planned unit development.[2] These agreements, which were recorded and involved the property owner making installment payments to the city, indicated that the contractual obligations contained therein constituted covenants that ran with the land and bound all successors in title. The city commission adopted multiple resolutions associated with the agreements and prepared and confirmed special assessment rolls for the improvements. Eventually, the property owner failed to pay the special assessments, a tax foreclosure action was commenced, a judgment of foreclosure was entered, the property owner failed to redeem the property or appeal the judgment, and title vested absolutely in the county treasurer as the foreclosing governmental unit. Subsequently, at a tax foreclosure sale, the county treasurer conveyed the property to plaintiff pursuant to a quitclaim deed.

More than one year later, plaintiff filed its complaint against defendants, alleging that under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., its "purchase was free and clear from all liens except any future installments of special assessments." Plaintiff asserted that despite the fact that title by fee simple absolute was conveyed to plaintiff in the tax foreclosure sale, the city continued to cloud the property's title "by improperly attempting to revive past installments for special assessments as well as contractual obligations that were extinguished upon the final

[2] The property consisted of 300 acres, only a portion of which was ultimately purchased by plaintiff at the tax foreclosure sale.

Judgment of Foreclosure . . . .” Plaintiff complained that defendants “wrongfully attempted to recoup past due special assessment installments and continue[d] to charge Plaintiff for the same . . . .” Plaintiff insisted that under the GPTA, all previously owed special assessment installments were extinguished by the judgment of foreclosure and that the county treasurer lacked the authority to deviate from the GPTA mandates.

As indicated earlier, the first four counts of plaintiff's complaint each sought declaratory relief with respect to a particular special assessment agreement. Count I pertained to a deferred-assessment agreement, which, according to plaintiff, was scheduled to be paid off in full eight years before the tax foreclosure; therefore, any debt owed for unpaid installments was extinguished by the judgment of foreclosure. Count II concerned a voluntary special assessment/development agreement (VSADA), which plaintiff alleged was to be paid off within 10 years under the language of the special assessment roll, and which date had elapsed before the entry of the judgment of foreclosure. Therefore, any accrued debt for nonpayment was extinguished by the foreclosure judgment. Count III regarded a landscape/irrigation agreement, and plaintiff alleged that the termination date was eight years from the confirmation of the special assessment roll and that the last scheduled date for an installment payment had passed before the tax foreclosure proceedings. Thus, according to plaintiff, the debt owed on the unpaid balance was extinguished by the judgment of foreclosure. Count IV pertained to an amended VSADA,[3] presenting a some-

[3] This was an amendment and extension of the agreement covered by Count II of plaintiff's complaint.

what different issue than that posed in the first three counts. The amended VSADA was not executed by the former property owner but was an agreement between the city and the county treasurer that was signed after title had vested with the county treasurer but before plaintiff acquired its interest. In Count IV, plaintiff alleged that "[t]here was no authority for the Defendants to enter into the [amended] []VSADA in an attempt to restore an assessment that had been voided by the GPTA." Plaintiff claimed that this agreement was not supported by any consideration and that it was against public policy. Finally, in regard to Count V, plaintiff alleged a cause of action for slander of title, seeking monetary damages. Plaintiff contended that defendants had maliciously and falsely continued to "assert that substantial special assessments exist on the Subject Property." Plaintiff maintained that defendants' "assertions have been published, as the installments claimed owing on the special assessments appear in title work, the public tax records, and in instruments recorded with the Kent County Register of Deeds." Plaintiff alleged that defendants' misrepresentations had rendered the property "unmarketable for its true value."

On competing motions for summary disposition, the circuit court, with respect to Counts I through IV, agreed with defendants' position that plaintiff was challenging the nature and imposition of the special assessments and, therefore, the MTT had exclusive jurisdiction over those counts. We note that the city, as confirmed in defendants' appellate brief, "was not seeking to collect the Deferred Assessment or the Landscape Irrigation Agreement[4] with respect to the

[4] These are the agreements referenced, respectively, in Counts I and III of plaintiff's complaint.

Subject Property." The circuit court rejected all of plaintiff's arguments regarding subject-matter jurisdiction. The circuit court also proceeded to rule:

> Even if the court were persuaded that Plaintiff's claims fall within the GPTA, Plaintiff's position is fatally flawed.
>
> A foreclosure under the GPTA specifically states that it extinguishes all liens against the property, including any lien for unpaid taxes or special assessments, except future installments of special assessments. MCL 211.78k(5)(c).[5] The Defendants have stated, both on the record and in brief form, that they are only pursuing collection of the Voluntary Special Assessment/Development Agreement installments referenced in Plaintiff's Count II. This assessment was amended after the foreclosure [see Count IV of plaintiff's complaint]. Moreover, it addresses future installments that will be collected until 2024. Therefore, the foreclosure sale does not operate to extinguish the installments.
>
> The court is also not persuaded by Plaintiff's claims that the assessment is actually a contract. As more full[y] discussed in subsection "a" of this opinion, the issue of whether the assessment is actually a contract is for the MTT to determine. However, the court notes that Plaintiff is not a party to the assessment/contract and likely lacks standing to challenge it. Additionally, the forming document states "the parties agree that, **to the extent not**

[5] We note that MCL 211.78k(5)(c) provides that a circuit court's final judgment of foreclosure shall specify, in part, as follows:

> That all liens against the property, including any lien for unpaid taxes or special assessments, except future installments of special assessments and liens recorded by this state or the foreclosing governmental unit pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, are extinguished, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

> **otherwise prohibited by law**, the jurisdiction and venue for any such dispute shall be solely with the state courts located in Kent County, Michigan." As discussed above, the MTT has exclusive jurisdiction over this matter. A contract cannot establish or alter jurisdiction. [Citation omitted.]

In regard to Count V, slander of title, the circuit court ruled that the claim constitutes a tort that is covered by governmental immunity and that none of the statutory exceptions to immunity applied. Accordingly, the circuit court denied plaintiff's motion for summary disposition and granted defendants' summary disposition motion under MCR 2.116(C)(4) and (7).

We review de novo a circuit court's ruling on a motion for summary disposition. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). "We likewise review de novo questions of subject matter jurisdiction . . . ." *Id*. "Further, the determination regarding the applicability of governmental immunity and a statutory exception to governmental immunity is a question of law that is also subject to review de novo." *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). Under MCR 2.116(C)(4), summary disposition is warranted when "[t]he court lacks jurisdiction of the subject matter." See also *Winkler*, 500 Mich at 333. Under MCR 2.116(C)(7), summary disposition is appropriate when a claim is barred based on "immunity granted by law." See also *Snead*, 294 Mich App at 354.

Subject-matter jurisdiction concerns the right of an adjudicative body to "exercise judicial power over [a] class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending[.]" *Winkler*, 500 Mich at 333 (quotation marks and citation omitted). The question of jurisdiction is not dependent on the truth or

falsity of the allegations, but upon their nature. *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 635; 928 NW2d 709 (2018). The inquiry into subject-matter jurisdiction is determinable at the commencement of a case, not its conclusion. *Id*. There is a vast difference between want of jurisdiction, in which case a court has no power whatsoever to adjudicate the matter, and an error in the exercise of undoubted jurisdiction, in which case the court's action is not void, even though it may be subject to direct attack on appeal. *Id*.

"Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605; see also Const 1963, art 6, § 13 ("The circuit court shall have original jurisdiction in all matters not prohibited by law[.]").[6] With respect to the MTT, it has "exclusive and original jurisdiction" over "[a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, *special assessments*, allocation, or equalization, under the property tax laws of this state." MCL 205.731(a) (emphasis

[6] MCL 600.601(1) provides:

> The circuit court has the power and jurisdiction that is any of the following:
>
> (a) Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (b) Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (c) Prescribed by the rules of the supreme court.

added). In *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 53; 832 NW2d 728 (2013), our Supreme Court extrapolated four elements from MCL 205.731(a), observing:

> Thus, for the tribunal to have jurisdiction pursuant to MCL 205.731(a), four elements must be present: (1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws. Where all such elements are present, the tribunal's jurisdiction is both original and exclusive.

"The divestiture of jurisdiction from the circuit court is an extreme undertaking"; however, "the Tax Tribunal Act[, MCL 205.701 *et seq*.,] clearly evidences a legislative intention that the circuit court not have jurisdiction over matters within the tribunal's exclusive jurisdiction." *Wikman v City of Novi*, 413 Mich 617, 645; 322 NW2d 103 (1982).

MCL 205.731(a) expressly lists "special assessments," and a special assessment "is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." *Kadzban v City of Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993) (opinion by GRIFFIN, J.). "In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes." *Id*. The Tax Tribunal Act grants the MTT "exclusive jurisdiction over [a] proceeding seeking direct review of the governmental unit's decision concerning a special assessment for a public improvement." *Wikman*, 413 Mich at 626.

We conclude that the particular allegations in Counts I through III of plaintiff's complaint squarely

presented a legal question regarding the effect of a tax foreclosure judgment on overdue special assessment installment payments; it is a pure issue of statutory construction. In *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 737-738; 322 NW2d 152 (1982), the Supreme Court described the composition of the MTT and the relevance of that composition, explaining:

> The tribunal that was created to exercise such jurisdiction was labeled a "quasi-judicial agency," whose membership is to be comprised of persons with various specified qualifications. Of the seven members, two must be attorneys with experience either in property tax matters or in judicial or quasi-judicial office. One member must be a certified assessor; one, an experienced professional real estate appraiser; and one, a certified public accountant with experience in state-local tax matters. . . . [P]ersons who are not members of any of the enumerated disciplines are required to have experience in state or local tax matters.
>
> The expertise of the tribunal members can be seen to relate primarily to questions concerning *the factual underpinnings of taxes*. In cases not involving special assessments, the tribunal's membership is well-qualified to resolve the disputes concerning those matters that the Legislature has placed within its jurisdiction: assessments, valuations, rates, allocation and equalization. In special assessment cases, the tribunal is competent to ascertain whether the assessments are levied according to the benefits received. Although the tribunal, in making its determinations, will make conclusions of law, the matters within its jurisdiction under MCL 205.731 most clearly relate to the basis for a tax . . . . [Citations omitted; emphasis added.]

In *Joy Mgt Co v Detroit*, 176 Mich App 722, 728; 440 NW2d 654 (1989), overruled in part on other grounds by *Detroit v Walker*, 445 Mich 682, 697 n 20 (1994), this Court noted that the MTT's "primary functions are to

find facts and review the decisions of agencies within its jurisdiction" and that its expertise chiefly relates "to questions concerning the factual underpinnings of taxes." The *Joy Mgt Co* panel ruled:

> In the instant case, plaintiff has not challenged a final decision regarding valuation, rates, allocation or assessment, nor is plaintiff asking for a refund or a redetermination of a tax. Rather, plaintiff has challenged the legality of the *method* used by defendant to enforce collection of the property taxes. Resolution of this issue depends not on findings of fact, but on conclusions of law based upon the construction of [MCL 211.47]. This is clearly within the scope of the circuit court's jurisdiction. Thus, the trial court did not err by denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(4), lack of subject-matter jurisdiction. [*Joy Mgt Co*, 176 Mich App at 728-729.]

In *In re Petition of the Wayne Co Treasurer for Foreclosure*, 286 Mich App 108, 112-113; 777 NW2d 507 (2009), this Court indicated that when a "challenge does not require any findings of fact, but rather only construction of law—where no factual issues requiring the tribunal's expertise are present—the circuit court has jurisdiction to consider the issue." The Court observed that this "reasoning applies to any challenge to a tax assessment based not on the validity of the assessment per se, but on peripheral issues relevant to enforcing a tax assessment." *Id*. at 113.

In this case, our review of Counts I through III of plaintiff's complaint reveals that plaintiff is not challenging the factual basis or the amount of the underlying assessments arising from the special assessment agreements; rather, plaintiff takes issue with the continuing enforceability of the assessments, at least in regard to outstanding past-due installments, in light of the tax foreclosure, arguing that past debt was extin-

guished by the judgment of foreclosure. It is important to keep in mind that, even though plaintiff's arguments at the summary-disposition stage may have deviated somewhat from the allegations in its complaint, it is the nature of those allegations alone that governs our resolution of whether the circuit court has subject-matter jurisdiction. *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996) ("A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint."); see also *Reynolds v Robert Hasbany, MD PLLC*, 323 Mich App 426, 431; 917 NW2d 715 (2018); *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 586; 644 NW2d 54 (2002); *Luscombe v Shedd's Food Prod Corp*, 212 Mich App 537, 541; 539 NW2d 210 (1995). Resolution of Counts I through III requires construction of the GPTA and the law of tax foreclosure, which has nothing to do with the factual underpinnings of the special assessments. The proceedings, as framed by plaintiff's complaint, did not entail plaintiff seeking direct review of a final decision, finding, ruling, or determination by the city relating to special assessments under the property tax laws of this state. MCL 205.731(a). Instead, plaintiff sought review of various GPTA foreclosure provisions and application of those provisions *to the existing factual circumstances*, which is not within the wheelhouse of the MTT's expertise. In Counts I through III, there is no allegation challenging the amount or the basis of a contractually created special assessment, nor is there an allegation that an improvement did not benefit the property in correlation to the cost of the improvement. Counts I through III of plaintiff's complaint did not trigger the MTT's original and exclusive jurisdiction.

With respect to the deferred-assessment agreement addressed in Count I and the landscape/irrigation agreement challenged in Count III, defendants, as recognized by the circuit court, maintained that the city does not seek to recover or hold plaintiff responsible for any amounts owing under those agreements/assessments. In light of this position, and given our ruling on subject-matter jurisdiction, we deem the appropriate course of action to be a remand to the circuit court for entry of declaratory relief in favor of plaintiff on those two counts, making clear that plaintiff owes nothing in regard to those agreements/assessments, nor is plaintiff's property to be subject to any lien or encumbrance connected to the two agreements/assessments.

With respect to Count II—the VSADA and the amendment of the VSADA after the foreclosure judgment but before the foreclosure sale, which amended agreement is addressed in Count IV of plaintiff's complaint—it is necessary to examine the record in more detail. The VSADA was entered into in 2004, and it provided that "[t]he term of the special assessment will not exceed ten (10) years." The VSADA further stated that it "shall be effective as of the date first written above and shall remain in effect until all the obligations of the Owner under this Agreement have been met." Additionally, the VSADA provided that "the final amount of any special assessment, the term of years for the special assessment and similar matters associated with the establishment of a special assessment district for the Owner-Contracted Infrastructure Improvements will be determined by resolution of the City Commission *in its discretion*." (Emphasis added.)

A resolution adopted by the city on July 15, 2014, indicated that a balloon payment totaling $403,620

was due on September 7, 2014, under the VSADA. The resolution, referring back to the city's right to exercise its discretion as stated in the VSADA, further provided:

> Without re-confirming the District's special assessment roll, the City Commission has determined that extending the term of the special assessment for one additional year [September 7, 2015] is in the public interest in order to allow the owner of the Property an opportunity to cause the balloon payment to be made and to bring the taxes and special assessment on the Property current, to make the Property more marketable, and to enhance economic development opportunities within the City.

On March 6, 2015, before the expiration of the one-year extension adopted by the city, the judgment of foreclosure was entered, vesting title in the county treasurer. The judgment became final and unappealable on April 1, 2015. In June 2015, the city and the county treasurer entered into the amended VSADA. The amended VSADA recited the history of the original VSADA, noted the foreclosure proceedings, referred to the language quoted earlier and found in the city's resolution adopted in July 2014, acknowledged the balance of $403,620, and set forth a payment structure requiring nine annual payments of $54,000 starting on September 7, 2015, with a final payment of $48,307 due on September 7, 2024. The amended VSADA also provided:

> The parties acknowledge and agree that the City, consistent with the terms of the [VSADA] and City Ordinance No. 4-67, as amended, has reserved to itself the right to extend the term of years for payment of the above-described special assessment without changing the date of the confirmation of the Roll or exposing the City to a challenge of the special assessment or Roll, as amended, and that it is the parties' intent that all challenges, claims

> or causes of action to any special assessment associated with the Property or the Roll are released and waived by the [county treasurer], its successors and assigns as against the City.

The amended VSADA was recorded with the register of deeds on June 23, 2015. In November 2015, plaintiff purchased the property at the tax foreclosure sale for $36,500.

We have already determined that the circuit court has subject-matter jurisdiction over Count II of the complaint concerning the VSADA, standing on its own. And we now hold that the circuit court also has subject-matter jurisdiction over Count IV of the complaint pertaining to the amended VSADA. With respect to Count IV, as stated earlier, plaintiff alleged that "[t]here was no authority for the [d]efendants to enter into the [amended] []VSADA in an attempt to restore an assessment that had been voided by the GPTA." Plaintiff asserted that the amended VSADA was not supported by any consideration and that it was against public policy. Regardless of the substantive soundness of plaintiff's argument, Count IV effectively alleged the creation or existence of a legally invalid contract that gave rise to a special assessment or the extension of a special assessment, resulting in an encumbrance on plaintiff's property.

The MTT does not have subject-matter jurisdiction over contract disputes simply because the substance of the contract regards special assessments. In *Highland-Howell Dev Co, LLC v Marion Twp*, 469 Mich 673, 677-678; 677 NW2d 810 (2004), our Supreme Court, after citing and quoting the language from *Romulus City Treasurer* that we alluded to earlier, ruled:

> While the Tax Tribunal's membership is particularly competent to resolve disputes related to the basis for and

> amounts of taxes, its membership is not qualified to resolve common-law tort or contract claims. Clearly, this supports our conclusion that the Legislature did not intend the Tax Tribunal's exclusive jurisdiction to encompass matters outside the realm of those tax matters specified in the statute.

As alleged by plaintiff, Count IV presented a question of contract law, as shaped by the construction of provisions in the GPTA. Count IV does not require any findings of fact or entail the factual underpinnings of taxes; rather, it concerns the construction of law—contract law and the GPTA. Therefore, the circuit court, not the MTT, has jurisdiction over Count IV.

That concluded, we must nonetheless continue our analysis because the circuit court supplemented its jurisdictional ruling with a determination that plaintiff's action was fatally flawed even if the court had subject-matter jurisdiction. The circuit court first found that the judgment of foreclosure was entered *before* the amended VSADA was executed. And therefore, pursuant to MCL 211.78k(5)(c), future installments of a special assessment are at issue, which necessarily could not have been extinguished by the foreclosure judgment. The court's ruling assumes the soundness and validity of the amended VSADA from which the special assessment arose. However, the allegations in Count IV of the complaint challenge the legal validity of the amended VSADA. If the amended VSADA and resulting assessment are void or voidable, the language in MCL 211.78k(5)(c) excepting future assessment installments from extinguishment becomes irrelevant because there is no assessment to enforce.

The circuit court next observed that plaintiff was not a party to the amended VSADA and thus "likely lacks standing to challenge it." We do not find this language

to reflect a conclusive ruling on standing, and any standing issue can certainly be entertained more fully and conclusively on remand. We do note that the special assessment based on the amended VSADA encumbers plaintiff's property to the tune of over half a million dollars. The circuit court did not address the allegations in Count IV of plaintiff's complaint that the amended VSADA was invalid because there was a lack of consideration and because it violated public policy. The legal validity of the amended VSADA must be addressed and resolved on remand.

Finally, with respect to Count V, the circuit court summarily dismissed the claim based on governmental immunity. In *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391-392; 822 NW2d 799 (2012), this Court set forth the basic analytical framework concerning governmental immunity:

> Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields and grants to governmental agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011); *Grimes v Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Duffy*, 490 Mich at 204. A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions. *Grimes*, 475 Mich at 77; *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). . . . This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. [Citation omitted.]

"[T]he burden . . . fall[s] on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense." *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). But "[a] plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Id*. at 478-479.

The sole argument posed by plaintiff on appeal is that defendants were not engaged in the exercise or discharge of a governmental function when attempting to collect an extinguished obligation. This argument lacks merit, failing to appreciate the difference between having the authority to generally engage in a particular governmental function and the negligent, improper, or wrongful performance of the authorized function. A "governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b).

A "city may in its charter provide . . . [f]or assessing and reassessing the costs, or a portion of the costs, of a public improvement to a special district." MCL 117.4d(1)(a). The Kentwood Code of Ordinances (KCO) grants the city authorization to impose special assessments. See KCO, § 10.1; KCO, § 50-2 ("The whole cost, or any part thereof, of any local public improvement may be defrayed by special assessment upon the lands especially benefitted by the improvement in the manner provided in this chapter."). Furthermore, KCO, § 50-13 authorizes the creation of liens relative to special assessments, providing that "[s]pecial assessments . . . shall become a personal obligation to the city . . . and, until paid, shall be and remain a lien upon the property assessed . . . ." Indeed, MCL 211.78k(5)(c) (see note 5 of this opinion), which plaintiff cites in its

complaint as supporting extinguishment of existing special assessments, recognizes the authority of governmental entities to record liens against property for special assessments.

In light of these authorities, the city was plainly engaged in the exercise and discharge of a governmental function for purposes of MCL 691.1407(1) and governmental immunity with respect to the special assessments at issue, their collection, and the resulting recorded liens. Plaintiff's argument simply challenges the specific manner in which the city carried out the governmental functions, alleging that the city clouded plaintiff's title by improperly attempting to collect payment on special assessments, making payment demands, and allowing recorded instruments to remain in place when the special assessments had been extinguished. In determining whether a governmental agency was engaged in the exercise of a governmental function, the focus must be on the general activity, not the particular conduct involved at the time the alleged tort was committed. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). The improper performance of an activity authorized by law is, regardless of the impropriety, still authorized for purposes of the governmental-function test. *Richardson v Jackson Co*, 432 Mich 377, 385; 443 NW2d 105 (1989). A governmental agency is not engaged in the exercise or discharge of a governmental function when it lacks the legal authority to perform the activity "in any manner." *Id*. at 387. That is not the situation in the instant case. Plaintiff has not established that the circuit court erred by summarily dismissing plaintiff's claim for slander of title.

Affirmed in part, and reversed and remanded in part for further proceedings. We do not retain jurisdiction.

No party having fully prevailed on appeal, we decline to award taxable costs under MCR 7.219.

O'CONNELL and BECKERING, JJ., concurred with MURPHY, P.J.

In re IM LONG, MINOR

Docket No. 344326. Submitted November 15, 2018, at Detroit. Decided November 20, 2018, at 9:15 a.m.

In 2012, two months after IML was born, the child's maternal grandmother petitioned the Oakland Circuit Court, Family Division, to be appointed IML's legal guardian; the petition was granted. In 2015, respondent-father initiated a paternity action in the Wayne Circuit Court, seeking to establish that he was IML's father; the action was unresolved and dismissed when respondent-father was incarcerated. In 2016, IML's grandmother filed a petition in the Oakland Circuit Court, Family Division, seeking to terminate the parental rights of the respondent-mother and the respondent-father. In September 2017, respondent-father established paternity of IML when he and respondent-mother filed an acknowledgment of parentage with the court. Following a trial, the court, Jeffrey S. Matis, J., found that it had jurisdiction over IML under MCL 712A.2(b)(2) and (6), and in May 2018, the court found that statutory grounds existed to terminate respondent-father's parental rights under MCL 712A.19b(3)(f), (g), (h), and (j). Respondent-father appealed.

The Court of Appeals *held*:

1. Child-protection proceedings consist of two phases: the adjudicative phase, in which the trial court determines whether statutory grounds exist under MCL 712A.2 to assume jurisdiction over a child, and the dispositional phase, in which the court determines what course of action will ensure the child's safety and well-being. Child protective proceedings begin when a petition is filed. MCL 712A.2 speaks in the present tense, and the trial court must accordingly examine the child's situation at the time the petition is filed when determining the issue of jurisdiction. Although child protective proceedings are initiated to protect children, the adjudicative phase is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights.

2. A trial court has jurisdiction over a child under MCL 712A.2(b)(2) when the child's home or environment, by reason of

neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. IML lived with petitioner, not with respondent-father, when petitioner filed the termination petition in the trial court, and the petition contained no allegations that petitioner's home was an unfit place for the child to live in. Accordingly, the trial court erred by exercising jurisdiction under MCL 712A.2(b)(2) because there were no facts to support that finding.

3. A trial court has jurisdiction under MCL 712A.2(b)(6) when the juvenile has a guardian under the Estates and Protected Individuals Code, MCL 700.1102 *et seq*., and the juvenile's parent has (1) failed or neglected, without good cause, to provide regular and substantial support for the juvenile for two years or more before the petition was filed and (2) the parent has regularly or substantially failed or neglected, without good cause, to do so for two years or more before the petition was filed. With regard to child-protection proceedings, MCR 3.903(A)(18) provides that the term "parent" means the mother, the father (as defined in MCR 3.903(A)(7)), or both, of the minor. Under MCR 3.903(A)(7), a "father" includes (1) a man married to the mother at any time from a minor's conception to the minor's birth, (2) a man who legally adopts the minor, (3) a man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor, (4) a man judicially determined to have parental rights, or (5) a man whose paternity is established by the completion and filing of an acknowledgment of parentage. Given the MCR 3.903(A)(7) definition of "father," a putative father is not a "father" and therefore also not a "parent" for the purpose of establishing a court's jurisdiction under MCL 712A.2(b)(6); a putative father's due-process rights would be violated if the court relied on the putative father's action or inaction in the two years preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6). In this case, petitioner was IML's guardian and respondent-father was still a putative father when the petition was filed. Because respondent-father was a putative father when the petition was filed, he was not a "father" for the purpose of establishing jurisdiction under MCL 712A.2(b)(6), and the trial court accordingly erred by finding jurisdiction over the child under that provision.

Trial court order assuming jurisdiction reversed, order terminating respondent-father's parental rights vacated, and case remanded for further proceedings.

PARENT AND CHILD — CHILD-PROTECTION PROCEEDINGS — JURISDICTION UNDER MCL 712A.2(b)(6) — PUTATIVE FATHER NOT A "FATHER" OR A "PARENT" FOR PURPOSES OF ESTABLISHING JURISDICTION.

In a child-protection proceeding, a trial court has jurisdiction under MCL 712A.2(b)(6) when the juvenile has a guardian under the Estates and Protected Individuals Code and the juvenile's parent has (1) failed or neglected, without good cause, to provide regular and substantial support for the juvenile for two years or more before the petition was filed and (2) the parent has regularly or substantially failed or neglected, without good cause, to do so for two years or more before the petition was filed; with regard to child-protection proceedings, MCR 3.903(A)(18) provides that the term "parent" means the mother, the father (as defined in MCR 3.903(A)(7)), or both, of the minor; given the MCR 3.903(A)(7) definition of "father," a putative father is not a "father" and therefore also not a "parent" for the purpose of establishing a court's jurisdiction under MCL 712A.2(b)(6); when considering whether to exercise jurisdiction under MCL 712A.2(b)(6), a putative father's due-process rights would be violated if the court relied on the putative father's action or inaction in the two years preceding the filing of the petition (MCL 700.1101 *et seq*.).

Middleditch Law Firm, PLLC (by *Keri Middleditch*) for petitioner.

Nancy E. Miller for respondent-father.

Before: JANSEN, P.J., and K. F. KELLY and BORRELLO, JJ.

JANSEN, P.J. Respondent-father appeals as of right the trial court's order terminating his parental rights to his minor child, IML, pursuant to MCL 712A.19b(3)(f), (g), (h), and (j).[1] We reverse, vacate the order terminating

[1] Respondent-mother's parental rights were also terminated by the same order. However, respondent-mother has not filed a claim of appeal. Therefore, vacating the termination order with respect to respondent-father has no effect on the termination of respondent-mother's parental rights.

respondent's parental rights, and remand for proceedings consistent with this opinion.

I. RELEVANT FACTUAL BACKGROUND

Respondent is the biological father of the minor child. In 2012, a couple months after the child's birth, the child's maternal grandmother (petitioner) initiated proceedings to become the child's legal guardian. The guardianship was established because the child's mother had left the child in the custody of petitioner and did not return. In 2016, petitioner filed a petition to terminate the parental rights of the mother and the child's then-unknown father. Petitioner listed respondent-father and another man as putative fathers. On the basis of his belief that he could be the minor child's father, respondent-father had previously initiated a paternity action in Wayne County in 2015. However, that action was dismissed before it was resolved after he was sent to prison. After this petition was filed, respondent-father formally established paternity over the child in September 2017, when he and respondent-mother filed an acknowledgement of parentage.[2] Following a trial in November 2017, the trial court issued an opinion and order finding that statutory grounds for jurisdiction over the child existed under MCL 712A.2(b)(2) and (6). After a subsequent hearing in May 2018, the trial court found that statutory grounds to terminate respondent-father's parental rights existed pursuant to MCL 712A.19b(3)(f), (g), (h), and (j). This appeal followed.

II. JURISDICTION

Respondent-father argues that the trial court erred

[2] The trial judge ordered DNA testing in March 2017, which established that respondent-father is the minor child's biological father.

by exercising jurisdiction under MCL 712A.2(b)(2) and (6).[3] We agree.

Our Supreme Court explained in *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), that

> [i]n Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase. Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase. Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. [Citation omitted.]

Child protective proceedings are initiated when a petition is filed in the trial court that contains facts constituting an offense against a child under MCL 712A.2(b) of the juvenile code, MCL 712A.1 *et seq*. *In re Sanders*, 495 Mich at 405; see also MCR 3.961(B)(3). "To acquire jurisdiction, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2 . . . ." *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). MCL 712A.2 "speaks in the present tense, and, therefore, the trial court must examine the child's situation at the time the petition was filed." *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004). Although child protective proceedings are initiated to protect children, the adjudicative phase "is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their

[3] We recognize that MCL 712A.2 was amended after the trial court issued its order finding that grounds existed for jurisdiction over the child. See 2018 PA 58, effective June 12, 2018. Although some language of the relevant subparagraphs changed, those changes do not affect the outcome of our decisions today, and all quotations are of the current version of that statute.

parental rights." *In re Sanders*, 495 Mich at 405-406 (quotation marks, citation, and brackets omitted).

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "Jurisdiction must be established by a preponderance of the evidence." *Id*. "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *Id*. "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

A. THIS COURT'S JURISDICTION

We first note that this case does not involve a collateral attack on the trial court's order terminating respondent's parental rights. The trial court entered its order of adjudication on January 18, 2018. That order was not appealable as of right. The trial court scheduled the initial disposition to be held at the time of the statutory-basis and best-interest hearing, which occurred on May 8, 2018. In the order terminating respondent-father's parental rights, the trial court noted that "[a]n adjudication was held and the child(ren) was/were found to come within the jurisdiction of the court." This was the first order that was appealable as of right, and therefore, respondent-father's challenge to the trial court's jurisdiction is not a collateral attack but, rather, a direct appeal.[4]

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[4] See *In re SLH, AJH & VAH*, 277 Mich App 662, 669 n 13; 747 NW2d 547 (2008), in which this Court explained that

> [s]ome, but not all, courts issue an Order of Adjudication following the plea or a trial at which jurisdiction was found. Other

B. MCL 712A.2(b)(2)

Respondent-father first challenges the trial court's jurisdiction under MCL 712A.2(b)(2).

The trial court assumed jurisdiction pursuant to MCL 712A.2(b)(2), which provides, in relevant part, that a trial court has

> [j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> * * *
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. As used in this sub-subdivision, "neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.[5]

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courts, however, do not issue an Order of Adjudication but only an order of disposition that includes the statement that "[a]n adjudication was held and the child(ren) was/were found to come within the jurisdiction of the court." MCR 3.993(B) provides that an Order of Adjudication may only be appealed by leave granted, whereas an initial order of disposition is the first order appealable as of right. Accordingly, because an initial order of disposition is the first order appealable as of right, an appeal of the adjudication following the issuance of an initial dispositional order is not a collateral attack on the initial adjudication, but a direct appeal, notwithstanding that a termination of parental rights may have occurred at the initial dispositional hearing. [Alteration in *In re SLH*.]

[5] "Neglect" is defined in the current version of MCL 722.602(1)(d) as "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." 2018 PA 60, effective June 12, 2018. As with MCL 712A.2, the minimal differences between the version of the statute

At the time the petition was filed, it is undisputed that IML was living with petitioner and not with respondent-father. Additionally, there were no allegations that petitioner's home was an unfit place for IML to live, which is a required finding before the trial court may assume jurisdiction under MCL 712A.2(b)(2). Because at the time the petition was filed there were no allegations that petitioner's home was "an unfit place for the juvenile to live in," we are left with a definite and firm conviction that the trial court erred by exercising jurisdiction under MCL 712A.2(b)(2).

C. MCL 712A.2(b)(6)

Respondent-father also challenges the trial court's jurisdiction under MCL 712A.2(b)(6).

The trial court also assumed jurisdiction pursuant to MCL 712A.2(b)(6), which provides, in relevant part, that a trial court has

> [j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> * * *
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> (6) If the juvenile has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and the juvenile's parent meets both of the following criteria:
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> (A) The parent, having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition. As used in this sub-

in effect when the adjudication order was entered and the current version do not affect our decision in this case.

> subdivision, "neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.
>
> (B) The parent, having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition. As used in this sub-subdivision, "neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.

In child-protection proceedings, MCR 3.903(A)(18) defines the term "parent" as "the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[6] MCR 3.903(A)(7) defines the term "father" as follows:

> (a) A man married to the mother at any time from a minor's conception to the minor's birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;
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> (b) A man who legally adopts the minor;
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> (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;
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> (d) A man judicially determined to have parental rights; or
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> (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., or a previously applicable procedure. For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment of parentage before

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[6] MCR 3.002(20) pertains to the parents of Indian Children and is not applicable to the facts of this case.

> a notary public appointed in this state. The acknowledgment shall be filed at either the time of birth or another time during the child's lifetime with the state registrar.

Accordingly, a putative father does not qualify as a father or parent for the purpose of exercising jurisdiction in child protective proceedings.

With respect to whether the trial court erred by exercising jurisdiction under MCL 712A.2(b)(6), there is no dispute that IML had a legal guardian (petitioner) at the time the petition was filed. Likewise, there is no dispute that respondent-father was only a putative father at the time the petition was filed in this case. In fact, respondent-father was not determined to be IML's legal father until September 7, 2017—more than a year after the petition was originally filed—when he and the child's mother filed an acknowledgment of parentage. Accordingly, because the trial court is required to "examine the child's situation at the time the petition was filed," *In re MU*, 264 Mich App at 279, respondent-father's status as a putative father on the date the petition was filed means that he does not qualify as a "parent" under MCL 712A.2(b)(6). Therefore, respondent-father's actions in the two years or more preceding the filing of the petition are immaterial. Although there was some evidence presented that respondent-father believed he could have been IML's father and should have perfected paternity sooner, as a putative father, he would have had no legal rights or obligations to IML before September 7, 2017. Regardless of any moral obligation, as a putative father, respondent-father had no legal obligation to IML. We therefore conclude that to rely on a putative father's action or inaction in the two years or more preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6) is violative of due

process. Given the foregoing, we are left with a definite and firm conviction that the trial court erred by exercising jurisdiction under MCL 712A.2(b)(6).

Briefly, we also note that the trial court erred by relying on *In re LE*, 278 Mich App 1; 747 NW2d 883 (2008), to determine that it had the authority to exercise jurisdiction under MCL 712A.2(b)(6), despite the fact that respondent-father was only a putative father at the time the petition was filed. The trial court's reliance on *In re LE* was erroneous for two reasons. First, this Court never addressed jurisdiction under MCL 712A.2(b)(6) in that case. Second, this Court ultimately relied on the one-parent doctrine to justify exercising jurisdiction over the minor child in that case because the respondent-mother had pleaded no contest to the allegations in the original petition. *Id*. at 17-18. However, the one-parent doctrine is unconstitutional and, therefore, now defunct. Accordingly, reliance on the reasoning of this Court in *In re LE* was erroneous. See *In re Sanders*, 495 Mich at 422, in which our Supreme Court reasoned that a specific adjudication of a particular parent's unfitness was required before the constitutionally protected parent-child relationship could be infringed.

Because the trial court erred by exercising jurisdiction under MCL 712A.2(b)(2) and (6), we reverse the trial court's order terminating respondent-father's parental rights.[7] See *Ryan v Ryan*, 260 Mich App 315, 343; 677 NW2d 899 (2004) (stating that "[b]ecause the trial court never properly assumed jurisdiction, all orders based on the wrongful assumption of jurisdiction are void ab initio").

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[7] Having determined that reversal is warranted on respondent-father's jurisdictional claims, we decline to address respondent-father's other arguments on appeal.

We reverse, vacate the order terminating respondent's parental rights, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

K. F. KELLY and BORRELLO, JJ., concurred with JANSEN, P.J.

HMEIDAN v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 338707. Submitted November 6, 2018, at Detroit. Decided November 27, 2018, at 9:00 a.m.

Malek Hmeidan filed an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company and Progressive Michigan Insurance Company, seeking to recover first-party personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., and uninsured motorist benefits. In 2012, plaintiff was injured when he hit the back end of a motor vehicle while driving a motorcycle; the operator of the motor vehicle did not stop and was never identified. At the time of the accident, plaintiff lived at his mother's house in Detroit but sometimes stayed at his brother's house, and his mother only stayed at her Detroit home two days a week. Plaintiff did not own any motor vehicles, but plaintiff's mother owned two motor vehicles that were insured by State Farm. The State Farm policy provided PIP coverage for the insured or any "resident relative," which included persons domiciled in the same household as the insured and related to the named insured by blood or adoption. The owner of the motorcycle that plaintiff was operating was married to a woman who had a motor vehicle insurance policy through Progressive. Plaintiff initially filed an action in 2013 in the Wayne Circuit Court against State Farm, seeking to recover PIP and other benefits. In that action, the court, John A. Murphy, J., denied State Farm's motion for summary disposition, ruling that there was a question of fact whether plaintiff was a resident relative for purposes of the State Farm policy, i.e., whether plaintiff was domiciled with his mother at the time of the accident and was therefore covered by the State Farm motor vehicle policy as a "resident relative." In 2015, the parties stipulated to the dismissal with prejudice of another insurance company that had already paid PIP benefits to or on behalf of plaintiff, stipulated to the dismissal without prejudice of plaintiff's complaint and that of the intervening medical providers who had provided services to plaintiff, and stipulated that plaintiff and the intervening plaintiffs could file another complaint against State Farm and Progressive within 30 days of that order. Plaintiff refiled his action against State Farm and Progressive, and Progressive moved for summary

disposition, arguing that under MCL 500.3114(5)(c), State Farm was responsible for plaintiff's PIP benefits as the highest-in-order-of-priority insurer because plaintiff was the operator of the motorcycle and a resident relative who was covered by his mother's State Farm motor vehicle insurance policy. The court, John A. Murphy, J., denied Progressive's motion. After the jury was selected for the trial and the parties gave opening statements, the court adjourned the trial, concluding as a matter of law that State Farm was excluded from the order of priority under MCL 500.3114(5)(c) because State Farm was not *plaintiff's* motor vehicle insurer and that Progressive was therefore the highest-in-priority insurer under MCL 500.3114(5)(d) as the insurer of the motorcycle owner's wife's motor vehicles. Progressive moved for reconsideration, which the trial court denied. Progressive appealed by leave granted.

The Court of Appeals *held*:

1. Although the no-fault act does not require a motorcycle owner to carry PIP coverage, under MCL 500.3114(5), a motorcycle operator or passenger who suffers bodily injury in an accident involving a motor vehicle may claim PIP benefits from motor vehicle insurers in the following order of priority: (1) the insurer of the owner or registrant of the motor vehicle involved in the accident, (2) the insurer of the operator of the motor vehicle involved in the accident, (3) the motor vehicle insurer of the operator of the motorcycle, and (4) the motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident. Therefore, when the owner or operator of the motor vehicle involved in the accident cannot be identified, MCL 500.3114(5)(c) and (d) provide that the motor vehicle insurer of the operator of the motorcycle involved in the accident is first in priority for purposes of PIP benefits and that the motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident is next in order of priority. Under the no-fault act, the term "vehicle" is a broader category that encompasses both motorcycles and motor vehicles; the term "motor vehicle" is a narrower category of vehicles that excludes motorcycles. Accordingly, while both motorcycles and motor vehicles are vehicles, a motorcycle is not a motor vehicle. In light of that distinction, the phrase "motor vehicle insurer" in MCL 500.3114(5)(c) and (d) refers to *any* motor vehicle insurance policies that cover a motorcycle rider; the phrase does not only refer to motor vehicle policies that specifically name the injured party as an insured, and it does not refer to the separate motorcycle insurance policy, which would not include PIP coverage at all. If the Legislature had wanted to prohibit motorcyclists from recovering PIP benefits through a motor vehicle policy that names

only a resident relative as the insured, such intention would be reflected in the statutory language.

2. In this case, State Farm would be the first-in-priority insurer under MCL 500.3114(5)(c) if plaintiff—the operator of the motorcycle—was a "resident relative" for purposes of the State Farm policy. In other words, under MCL 500.3114(5), State Farm would be higher in priority than Progressive to pay PIP benefits to plaintiff. Therefore, the trial court erred by concluding that State Farm was excluded from the order of priority for PIP benefits under MCL 500.3114(5)(c). Remand was necessary because fact questions existed regarding whether plaintiff was covered under the State Farm motor vehicle policy as a resident relative and whether plaintiff was precluded from recovering PIP benefits under MCL 500.3113(a) because he knew the motorcycle was stolen at the time of the accident.

Reversed and remanded.

NO-FAULT INSURANCE — ACCIDENTS INVOLVING MOTORCYCLES AND MOTOR VEHICLES — MOTORCYCLE OPERATORS AND PASSENGERS — PERSONAL PROTECTION INSURANCE COVERAGE — DEFINITION OF "MOTOR VEHICLE INSURANCE."

Although the no-fault act does not require a motorcycle owner to carry personal protection insurance (PIP) coverage, under MCL 500.3114(5), a motorcycle operator or passenger who suffers bodily injury in an accident involving a motor vehicle may claim PIP benefits from motor vehicle insurers in order of the following priority: (a) the insurer of the owner or registrant of the motor vehicle involved in the accident, (b) the insurer of the operator of the motor vehicle involved in the accident, (c) the motor vehicle insurer of the operator of the motorcycle, and (d) the motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident; the phrase "motor vehicle insurer" in MCL 500.3114(5)(c) and (d) refers to any motor vehicle insurance policies that cover a motorcycle rider; the phrase does not only refer to motor vehicle policies that specifically name the injured party as an insured, and it does not refer to the separate motorcycle insurance policy, which would not include PIP coverage at all (MCL 500.3101 *et seq*.).

Miller, Canfield, Paddock and Stone, PLC (by *Paul D. Hudson*, *Ryan K. Elsey*, and *Samantha S. Galecki*) and *Moffett Vitu Lascoe & Packus, PC* (by *Kenneth P. Williams*) for State Farm Mutual Automobile Insurance Company.

Secrest Wardle (by *Paul A. McDonald* and *Olga Khessina*) for Progressive Michigan Insurance Company.

Before: MURRAY, C.J., and METER and GLEICHER, JJ.

MURRAY, C.J. Defendant Progressive Michigan Insurance Company appeals by leave granted[1] the May 2, 2017 Wayne Circuit Court order embodying the trial court's ruling that defendant State Farm Mutual Automobile Insurance Company was excluded from the order of priority for first-party no-fault benefits in the current lawsuit filed by plaintiff, Malek Hmeidan, and that Progressive is the highest-priority insurer for plaintiff's claim for no-fault benefits. We reverse and remand for further proceedings.

I. BACKGROUND FACTS

This lawsuit arises from a collision between a motorcycle and motor vehicle. Plaintiff claims that he was "test-driving" a motorcycle for sale by "an associate."[2] While plaintiff was operating the motorcycle, a car failed to stop at a stop sign and turned in front of him. Once plaintiff applied the brakes, the motorcycle began to skid and collided with the back of the car. The operator of the car immediately fled the scene. Progressive insured the motor vehicles of the wife of the owner of the motorcycle involved in the accident.

At the time of the accident, plaintiff lived at his mother's house in Detroit, but he sometimes stayed at his brother's house in Melvindale. Plaintiff did not own

[1] *Hmeidan v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered October 17, 2017 (Docket No. 338707).

[2] There is significant evidence that the motorcycle was stolen, but that concern is not relevant to the issues raised on appeal.

a motor vehicle at the time of the accident, although his mother, Aida Hmeidan, owned two motor vehicles that were insured by State Farm. The State Farm policy booklet contains language stating that the policy provided personal protection insurance (PIP) coverage for the insured "or any *resident relative*." The policy booklet pertinently defines "resident relative" to mean "a *person*, other than *you*, domiciled in the same household with the first *person* shown as a named insured on the Declarations Page and who is: 1. related to that named insured or his or her *spouse* by blood, marriage, or adoption . . . ." (Paragraph structure omitted.)

A. THE 2013 LAWSUIT

In March 2013, plaintiff filed a complaint seeking no-fault and uninsured motorist benefits against Farmers Insurance Exchange as the assigned carrier[3] and against State Farm based on the insurance policy issued to his mother.

According to Progressive, on March 19, 2014, State Farm moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff was not a "resident relative" of Aida (its insured) at the time of the accident because plaintiff and Aida "were primarily living at different locations," which precluded plaintiff from resident-relative status. State Farm relied on plaintiff's deposition testimony that he primarily lived at the Detroit residence and that he occasionally stayed at his brother's home in Melvindale, as well as the deposition testimony of plaintiff's mother and brother that prior to the accident, Aida was living at

[3] Apparently, plaintiff filed a claim with the Michigan Assigned Claims Plan, which assigned Farmers to handle the claim. Farmers paid some benefits to plaintiff but, at some point, stopped doing so.

her son's home in Melvindale during the week and only stayed at her residence in Detroit for two days each week. According to Progressive, the trial court denied State Farm's motion, "finding a question of fact existed on the issue of whether plaintiff was a resident relative, i.e., domiciled with Aida on the date of the underlying accident."

Farmers subsequently filed a cross-claim against State Farm, and third-party claims against Allstate Insurance Co and Progressive, seeking a declaratory judgment that one of the entities was the highest in the order of priority to pay PIP benefits and seeking reimbursement of the benefits it had already paid to plaintiff. Eventually, Farmers moved for summary disposition pursuant to MCR 2.116(C)(10) on the grounds that State Farm, Allstate, or Progressive was the highest-priority insurer. Progressive responded and sought summary disposition in its favor on the ground that plaintiff was covered under the State Farm policy. The trial court denied Farmers' motion for summary disposition and adjourned Progressive's motion for summary disposition to allow supplemental briefs. In its supplemental brief, State Farm asserted that the trial court had previously ruled that there was a genuine issue of material fact as to plaintiff's residence and that, therefore, this finding must be applied to Progressive's motion.

Following a settlement conference, the parties agreed to dismiss plaintiff's claims against Farmers. Plaintiff's action against Farmers, and Farmers' action against State Farm and Progressive, were dismissed with prejudice; plaintiff's claims and those of the intervening medical providers were dismissed without prejudice, and Progressive and State Farm agreed to waive the one-year-back rule under MCL 500.3145 if plaintiff refiled the action.

B. THE CURRENT LAWSUIT

On June 3, 2015, plaintiff filed the current action against State Farm and Progressive, claiming that he was entitled to first-party and uninsured motorist benefits. The case was assigned to the same judge who presided over the 2013 lawsuit. During the course of the proceedings, the parties filed several motions for summary disposition, one of which the trial court granted, dismissing plaintiff's claims for uninsured motorist and underinsured motorist benefits against Progressive.

Progressive filed a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that MCL 500.3114(5) sets forth the order-of-priority rule for individuals who sustain accidental bodily injury while operating a motorcycle that is involved in a motor vehicle accident and that State Farm is the highest-priority insurer for PIP benefits because plaintiff's mother maintained a policy of insurance with State Farm and plaintiff and his mother were domiciled in the same household at the time of the accident. Therefore, Progressive argued, State Farm is "[t]he motor vehicle insurer of the operator of the motorcycle involved in the accident." MCL 500.3114(5)(c). In response, State Farm asserted that the trial court had previously denied Farmers' summary disposition motion (in the 2013 lawsuit) on the issue of domicile and had ruled that the domicile of plaintiff was a question to be decided by the fact-finder.[4] The register of actions indicates that the trial court denied Progressive's motion.

Leading up to the scheduled trial date of April 10, 2017, State Farm and Progressive filed several mo-

[4] State Farm also asserted in the response that it had filed a motion for summary disposition "against" plaintiff on the issue of domicile, which the trial court denied.

tions, including one to bifurcate the trial on plaintiff's claims for PIP benefits and for uninsured motorist benefits. The trial court entered an order granting the motions, stating that the trial would be initially limited to the issues of (1) whether plaintiff should have known that the motorcycle was stolen and is therefore precluded from receiving PIP benefits under MCL 500.3113(a), and (2) whether plaintiff was domiciled with his mother on the date of the accident.

Trial began on April 10, 2017, and voir dire continued the following day. When the parties appeared on April 17, 2017, the trial court initiated a discussion about the interpretation of the priority statute, MCL 500.3114(5), questioning why the resident-relative issue was pertinent. Counsel for both Progressive and State Farm explained that if plaintiff was not domiciled with his mother, then State Farm is not the insurer of the operator of the motorcycle. The trial court repeatedly questioned whether there could be a "motor vehicle insurer of the operator of the motorcycle" under MCL 500.3114(5)(c) when plaintiff did not have an insurance policy himself and did not own a vehicle. Progressive, plaintiff, and the intervening plaintiffs[5] maintained that if a person was entitled to no-fault coverage as a resident relative of a named insured, that insurer was the "motor vehicle insurer of the operator." Counsel for Progressive also noted that if the trial court's logic were applied to similar language in MCL 500.3114(5)(d), then Progressive was not liable because Guillermo Flores, Jr. (the registered owner of the stolen motorcycle) was not a named insured.

The trial court ultimately concluded that State Farm could not be liable under MCL 500.3114(5)(c) and that Progressive could be liable as the motor vehicle

[5] Two medical providers that are not involved in this appeal.

insurer of the owner of the motorcycle, even though Flores was not named on his wife's policy. The trial court reasoned:

> Let's go back to [MCL 500.3114(5)(c)]. [It] states that the motor vehicle insurer of the operator of the motorcycle.
>
> Okay. The motor vehicle insurer doesn't exist because [plaintiff] did not own a vehicle and . . . as a result [he] did not did not have insurance on that vehicle. How could he if he didn't own one?
>
> [MCL 500.3114(5)(d)] indicates a motor vehicle insurer of the owner . . . of the motorcycle, assuming [Flores] owns a Chevy and the insurer of that Chevy would be responsible.

When plaintiff's counsel asserted that if Progressive were determined to be not liable under MCL 500.3114(5)(d), then State Farm could potentially be liable under MCL 500.3114(1) (resident relative), the trial court responded that State Farm could not be liable because Progressive was higher in the order of priority. Having concluded that Progressive was the highest-priority carrier, the trial court ordered the case back for case evaluation. In the uninsured-motorist portion of the case, the trial court indicated that it would schedule a hearing on whether plaintiff's mother had made a material misrepresentation about her residency that would make the policy void. As a result, the trial court entered an order stating that State Farm was excluded from the order of priority pursuant to MCL 500.3114(5)(c) and that Progressive was the highest-priority insurer pursuant to MCL 500.3114(5)(d).

Progressive moved for reconsideration, arguing that the trial court committed palpable error when it held that State Farm was not plaintiff's motor vehicle insurer under MCL 500.3114(5)(c). Progressive pri-

marily relied on *Prishtina v Auto Club Ins Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued March 10, 2015 (Docket No. 318912). The trial court addressed Progressive's motion at a hearing, noting that *Prishtina* was unpublished and that this case involved a different issue. For those reasons, the trial court denied Progressive's motion for reconsideration.

II. ANALYSIS

For the reasons explained below, we hold that the trial court erroneously interpreted and applied MCL 500.3114(5)(c)[6] and that the court erred when it concluded that State Farm could not possibly be the highest-priority insurer for plaintiff's PIP claim. "The proper interpretation and application of a statute is a question of law, which this Court reviews de novo." *Rogers v Wcisel*, 312 Mich App 79, 86; 877 NW2d 169 (2015).

As with many of the no-fault cases that have flooded Michigan courts in the last decade or so, the dispositive issue in this case revolves around the priority provisions of the act. In particular, we must decide whether State Farm was properly determined to not have priority. "Generally, under MCL 500.3101(1) and MCL 500.3114(1), an individual must seek no-fault benefits from his own insurer unless one of the exceptions enumerated in MCL 500.3114(2), (3), or (5) applies." *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*,

[6] Progressive contends that this Court should "strike" State Farm's arguments regarding MCL 500.3114(5)(c) because State Farm did not raise these arguments in the trial court. Progressive's argument lacks merit. The issue was raised below, albeit by the trial court, and it is therefore preserved for this Court's review. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 182-183; 521 NW2d 499 (1994).

272 Mich App 106, 111; 724 NW2d 485 (2006). "The exception at issue here, MCL 500.3114(5), establishes the priority in which a motorcycle rider accidentally injured by a motor vehicle must claim no-fault benefits." *Id*. MCL 500.3114(5) provides:

> (5) A person suffering accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

A motorcycle is not a "motor vehicle" under the no-fault act, MCL 500.3101 *et seq*. *Auto-Owners Ins Co v Hoadley*, 201 Mich App 555, 558-559; 506 NW2d 595 (1993). The term "vehicle" is a broader category that encompasses both motorcycles and motor vehicles; the term "motor vehicle" is a narrower category of vehicles that excludes motorcycles. *Id*. at 559. "Thus, while both motorcycles and motor vehicles are vehicles, a motorcycle is not a motor vehicle." *Id*.

All parties agree that MCL 500.3114(5)(a) and (b) cannot apply because the driver of the motor vehicle involved in the accident fled the scene and was not found. Consequently, neither the owner nor the operator of the motor vehicle that struck plaintiff is a known party. Rather, this case concerns MCL 500.3114(c) and (d). State Farm insures a motor vehicle owned by

plaintiff's mother, Aida, and its policy extends coverage to family members who reside in Aida's household. According to Progressive, State Farm's policy covers plaintiff as a resident relative of Aida's household and therefore State Farm is the highest-priority insurer under MCL 500.3114(5)(c). In the trial court, State Farm disputed whether plaintiff resided with Aida and contended that Progressive was the highest-priority insurer under MCL 500.3114(5)(d) because Progressive insured the owner of the motorcycle.

The overall goal of statutory interpretation is to give effect to the intent of the Legislature. *Garfield Mart, Inc v Dep't of Treasury*, 320 Mich App 628, 643; 907 NW2d 880 (2017). "The best indicator of that intent is the plain and ordinary language used." *Id*. "In construing a statute, the Court must read the language as a whole, giving meaning to each word in the context of the statute." *Id*. "If the language is unambiguous, then the language must be applied as written." *Id*. This Court must avoid any construction of a statute that renders any part of the statute surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). It must also be remembered that the purpose of the no-fault act is to "keep[] insurance premiums at affordable rates while providing victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 217-218; 815 NW2d 412 (2012). Because the act is remedial, it must be construed liberally in favor of those who are the intended beneficiaries of the act. *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004). Specific terms of the no-fault act are read in the context of the entire act. *Id*. "[C]ourts should not abandon common sense when construing a statute." *Id*. (quotation marks and citation omitted).

Our decision turns on the meaning of the phrase "motor vehicle insurer" in the context of MCL 500.3114(5). Progressive contends that the phrase "motor vehicle" does not restrict coverage under MCL 500.3114(5)(c) or (d) to instances in which the motorcyclist owns and insures a separate motor vehicle. Rather, the phrase identifies the general category of insurer; it distinguishes an insurer providing coverage to a motor vehicle as opposed to an insurer providing a different type of coverage.

To understand MCL 500.3114(5), one must consider the context in which it comes into play: an accident involving both a motorcycle and a motor vehicle. Owners of motor vehicles are required by the no-fault act to carry PIP coverage, while owners of motorcycles are not. MCL 500.3101(1); *Perkins v Auto-Owners Ins Co*, 301 Mich App 658, 665-666; 837 NW2d 32 (2013). Pursuant to MCL 500.3103(2), motorcycle insurers are required to *offer* medical-benefits coverage to owners of motorcycles seeking a motorcycle insurance policy. But those benefits are not required, and they are much more limited than the PIP benefits that must be provided in motor vehicle policies. Under MCL 500.3103(2), motorcyclists must be offered "security for the payment of first-party medical benefits only, in increments of $5,000.00, payable in the event the owner or registrant is involved in a motorcycle accident." In contrast, motor vehicle policies are required to include coverage for "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation," MCL 500.3107(1)(a), work-loss benefits, MCL 500.3107(1)(b), and replacement services of up to $20 each day for the first three years after the accident, MCL 500.3107(1)(c). Yet despite not requiring motorcyclists to obtain PIP coverage, our Legislature has extended PIP coverage to motorcy-

clists by statute, at least in instances in which a motor vehicle is involved in an accident with a motorcyclist. *Perkins*, 301 Mich App at 665, citing MCL 500.3114(5). In other words, our Legislature has made a policy choice to provide motorcyclists with the more expansive PIP coverage whenever they are injured in an accident involving a motor vehicle, rather than being limited to the optional medical-benefits coverage motorcyclists may also choose to purchase.

With that in mind, it is quite clear that by using the phrase "motor vehicle insurer," the Legislature was simply delineating between the injured party's motorcycle policy and any applicable motor vehicle policies. Under MCL 500.3114(5), the highest-priority insurer is "[t]he insurer of the owner or registrant of the motor vehicle involved in the accident." MCL 500.3114(5)(a). The second-in-priority insurer is "[t]he insurer of the operator of the motor vehicle involved in the accident." MCL 500.3114(5)(b). Because these order-of-priority provisions refer to the insurers of those owning or operating a motor vehicle, there was no need for the Legislature to include the additional description of "motor vehicle" before the word "insurer" in either MCL 500.3114(5)(a) or (b); that was the only type of insurer that could be at issue. But MCL 500.3114(5)(c) and (d) both focus on insurers of the operators or owners of motorcycles. MCL 500.3114(5)(c) makes the third-in-priority insurer the "*motor vehicle* insurer of the operator of the motorcycle," while MCL 500.3114(5)(d) makes the fourth-in-priority insurer the "*motor vehicle* insurer of the owner or registrant of the motorcycle . . . ." (Emphasis added.) The reason the Legislature included the phrase "motor vehicle" before the word "insurer" in each of these subsections is very apparent. Our Legislature was making clear that it was speaking of any motor vehicle policies that covered the motorcycle rider, which

would be required to provide PIP coverage, not the separate motorcycle insurance policy, which would not include PIP coverage at all. This is consistent with how we interpreted MCL 500.3114(5) in *Perkins*, 301 Mich App at 666, in which this Court explained that "[u]nder MCL 500.3114(5), the motorcycle insurance policy is never the source of the payment of PIP benefits."

State Farm contends that it should be plainly obvious that MCL 500.3114(5)(c), and presumably MCL 500.3114(5)(d), refer to motor vehicle insurers, and that there was therefore no need for the Legislature to include the additional descriptor of "motor vehicle" in Subdivisions (c) and (d) unless it intended for the phrase to have some additional meaning. According to State Farm, this additional meaning is what the trial court gave the statute: that MCL 500.3114(5)(c) only speaks to policies that specifically name the injured party as an insured. This argument fails for at least two reasons.

First, even assuming that it should be obvious that MCL 500.3114(5)(c) is speaking to motor vehicle policies and not motorcycle policies, a somewhat dubious assumption, this does not mean that the Legislature's choice of language is rendered nugatory by giving it that obvious meaning. Stated otherwise, that the Legislature chose to make the obvious clear does not mean that the clarifying language is meaningless. Second, had the Legislature wished to limit MCL 500.3114(5)(c) in the way State Farm suggests, it could have done so. For example, and as Progressive suggests, the Legislature could have written MCL 500.3114(5)(c) as stating, "The motor vehicle insurer of the named insured who operated the motorcycle involved in the accident." Alternatively, if the Legislature wished to prohibit motorcyclists from recovering no-fault benefits through a motor vehicle policy that

names only a resident relative as the insured, it could have said as much. Ultimately, State Farm's position asks this Court to place a restriction in the statute that simply is not there. That goes beyond our judicial power. *Faircloth v Family Independence Agency*, 232 Mich App 391, 409-410; 591 NW2d 314 (1998).

When the Legislature spoke of a "motor vehicle insurer" in MCL 500.3114(5)(c) and (d), it was speaking of just that—a motor vehicle insurer. State Farm insures Aida's motor vehicle and, as such, is a motor vehicle insurer. What is left for the jury to decide is whether State Farm insures "the operator of the motorcycle"—plaintiff. In this regard, it is undisputed that State Farm's policy extends coverage to relatives of Aida residing in her household. Clearly, plaintiff is a relative of his mother. But it must be determined whether he is a resident of her household. Therefore, before it may be determined whether State Farm is the highest-priority insurer, the matter must be remanded to the trial court for a jury to answer the question that the parties intended to have answered through trial: whether plaintiff resided with Aida.[7]

The trial court's order is reversed, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs to either side, the trial court having raised the issue on its own. MCR 7.219(A).

METER and GLEICHER, JJ., concurred with MURRAY, C.J.

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[7] To be clear, the trial court must also obtain an answer to another question relevant to whether plaintiff may obtain benefits that was raised below: whether plaintiff is precluded from receiving PIP benefits under MCL 500.3113(a) because he knew the motorcycle was stolen at the time of the accident.

AYOTTE v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 339090. Submitted September 5, 2018, at Lansing. Decided November 27, 2018, at 9:05 a.m.

Joseph Ayotte brought an action in the Arenac Circuit Court against the Department of Health and Human Services, appealing the decision of an administrative law judge (ALJ) that upheld defendant's cancellation of Title IV-E foster-care funding for plaintiff. Plaintiff, who was 16 years old at the time, had engaged in domestic violence on November 10, 2014, and Arenac Circuit Court Judge Richard Vollbach entered a temporary detention order on November 11, 2014. Plaintiff entered a plea of admission to a delinquency petition on November 12, 2014, and Judge Vollbach ordered plaintiff to serve three days in a detention center, after which he would be placed on probation under the supervision of a juvenile officer in the home of his mother. Later on that same day, defendant filed a child-protection petition seeking plaintiff's removal from his mother's home, citing, among other things, the mother's problems with substance abuse. The court assumed jurisdiction over plaintiff on November 13, 2014, and specified that plaintiff would be removed from the home on November 14, 2014, because continuation in the home would be contrary to plaintiff's welfare. Defendant initially determined that plaintiff was eligible for Title IV-E foster-care funding for his placement, but a Title IV-E specialist later determined that plaintiff was not eligible because the November 11, 2014 temporary detention order removing plaintiff from his home did not contain language indicating that it was contrary to plaintiff's welfare to be removed from his home pursuant to 42 USC 672(a)(2)(A)(ii) and 45 CFR 1356.21(c). Plaintiff's guardian ad litem sought an administrative hearing. The ALJ concluded that while a contrary-to-the-welfare finding was made in the November 13, 2014 order following the preliminary hearing, that order was not a removal order because plaintiff had already been removed from the home pursuant to the temporary detention order; therefore, the ALJ concluded that defendant appropriately denied plaintiff the Title IV-E funding. Plaintiff appealed in the circuit court, and the court, Harry P. Gill, J., on assignment by the State Court Administrative Office, reversed the ALJ's decision,

concluding that the temporary detention order was not the first order of removal but rather an arrest warrant. The court reasoned that there was no contemplation that removal from the home was necessary at the time the detention order was entered; the purpose of the detention order was to punish the child, and it was only when the child-protection petition was filed that it became apparent to the court that the issue of removal—for purposes of the child's welfare, rather than to punish the child—was necessary. Accordingly, the court held that plaintiff was eligible for Title IV-E funding because a contrary-to-the-welfare determination had been made in the order after the preliminary hearing. Defendant appealed.

The Court of Appeals *held*:

Under 42 USC 672(a)(1), in order to be eligible for Title IV-E foster-care maintenance payments, the child must have been removed from the home of a relative and placed "into foster care," and the removal and foster-care placement must meet, and continue to meet, the requirements of 42 USC 672(a)(2). Under 42 USC 672(a)(2)(A)(ii), the removal and foster-care placement must be in accordance with a judicial determination that continuation in the home from which the child was removed would be contrary to the welfare of the child. This requirement is similarly set forth in 45 CFR 1356.21(c), which provides that if the contrary-to-the-welfare determination is not made in the first court ruling pertaining to removal from the home, then the child is not eligible for Title IV-E foster-care maintenance payments for the duration of that stay in foster care. A plain reading of 42 USC 672(a) only requires a court to make the requisite Title IV-E eligibility finding when a child is removed from the home *into foster care*; the statute links the concept of removal to the placement setting, i.e., foster care. In this case, funding was not dependent on a contrary-to-the-welfare finding having been made when the detention order was issued because the detention order did not place plaintiff into foster care. Moreover, 42 USC 672(c) specifically excludes "detention facilities" from the definition of a childcare institution. Plaintiff was not removed from the home and placed into foster care by way of the November 11, 2014 detention order; rather, he was apprehended and placed into a juvenile-detention facility because of his alleged criminal acts. Consequently, the requirement that the state obtain a judicial determination that it was contrary to the welfare of the child to remain in the home for purposes of Title IV-E foster-care funding eligibility was not triggered at this point. It was the November 13, 2014 order that indicated that plaintiff's removal from the home and into foster

care was justified on the basis of adverse family circumstances; this order contained the requisite contrary-to-the-welfare finding, and therefore plaintiff was eligible for Title IV-E foster-care funding.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Brian K. McLaughlin*, Assistant Attorney General, for the Department of Health and Human Services.

Allegiant Legal, PC (by *Paula A. Aylward*) for Joseph Ayotte.

Amici Curiae:

William E. Ladd for the State Bar of Michigan Children's Law Section.

Dorene S. Allen, *Monte J. Burmeister*, and *Susan J. Dobrich* for the Michigan Probate Judges Association.

Before: METER, P.J., and K. F. KELLY and GLEICHER, JJ.

METER, P.J. Defendant, the Michigan Department of Health and Human Services, appeals by leave granted an order reversing defendant's determination to cancel the Title IV-E[1] foster-care funding of plaintiff, Joseph Ayotte. We conclude that because the temporary detention order issued against plaintiff was not an order removing him from his home and *into foster care*, the fact that this order did not include a "contrary to the welfare" finding, see 42 USC 672(a)(2)(A)(ii), does not preclude plaintiff's eligibility for Title IV-E foster-care funding. We affirm the decision of the circuit court.

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[1] See 42 USC 670 *et seq*.

Plaintiff, 16 years old at the time, engaged in domestic violence, see MCL 750.81(2), on November 10, 2014, and Arenac Circuit Court Judge Richard Vollbach entered a temporary detention order on November 11, 2014. Plaintiff admitted to assaulting his mother and entered a plea of admission to a delinquency petition on November 12, 2014. Judge Vollbach ordered plaintiff to serve three days in the Roscommon Juvenile Detention Center (RJDC), after which he would be "placed on intensive probation under the supervision of the juvenile officer" in the home of his mother.

However, later in the day on November 12, defendant filed a child-protection petition seeking plaintiff's removal from his mother's home, citing, among other things, her problems with substance abuse. After a plea by the mother, the court assumed jurisdiction over plaintiff on November 13, 2014, and specified a removal-from-the-home date of November 13, 2014. In an amended order of adjudication signed on November 14, 2014, the court ordered that plaintiff be placed with defendant for care and supervision after his "release[] from the [RJDC] on Friday, November 14, 2014[.]"

Initially, defendant determined that plaintiff was eligible for Title IV-E foster-care funding for his placement outside his mother's home. See 42 USC 670 *et seq*.[2] Thereafter, in November 2015, Tiphanie Charbon-

[2] 42 USC 670 (2014), the version of the statute in effect at the time of defendant's eligibility determination, stated:

> For the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would have been eligible for assistance under the State's plan approved under part A of this subchapter (as such plan was in effect on June 1, 1995) and adoption assistance for children with special needs, there are authorized to be appropriated for each fiscal year . . . such sums

neau, a Title IV-E specialist with defendant, conducted an annual review of Title IV-E funding, and plaintiff's case was chosen at random for a specific review. Charbonneau concluded that plaintiff, "in fact, was not supposed to be IV-E eligible" because the delinquency order removing plaintiff from his home did not contain language indicating that it was contrary to plaintiff's welfare to be removed from his home.

Plaintiff's guardian ad litem sought an administrative hearing. The administrative law judge (ALJ) noted that FOM 902 of defendant's *Children's Foster Care Manual*[3] was at issue. FOM 902 addresses "funding determinations and Title IV-E eligibility," and the version in effect at the time of the hearing provided, in relevant part:

> Federal regulations require the court to make a contrary to the welfare or best interest determination **in the first court order removing the child from his/her home** for title IV eligibility. The court order must coincide with removal of the child. . . .
>
> * * *
>
> **Note:** The court can make the contrary to the welfare finding on any order as long as the determination is made.[4]

Relying on 42 USC 672(a)(2)(A)(ii) and 45 CFR 1356.21(c), the ALJ found that "while the finding of

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as may be necessary to carry out the provisions of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part.

[3] Michigan Department of Health and Human Services, *Children's Foster Care Manual*, FOM 902, FOB 2014-004 (May 1, 2014), available at <https://perma.cc/68JU-SE6P>.

[4] *Id*. at 19.

contrary to the welfare was made in the Order After Preliminary Hearing [in the child-protection matter], the order was not a removal order as the child was already removed as clearly documented in the Order to Apprehend and Detain . . . ." The ALJ concluded that defendant "acted in accordance with Department policy when it denied continuing Title IV-E funding . . . because the Court's Order to Apprehend and Detain did not have the requisite contrary to the welfare findings."

Plaintiff appealed in the circuit court, which concluded that the ALJ committed clear legal error. The circuit court entered an order reversing the ALJ's decision "[f]or the reasons stated on the record . . . ." The court concluded on the record that the temporary detention order was not the first order of removal but, rather, was an arrest warrant. The court stated:

> There was no contemplation that the removal from the home was necessary, the purpose of the warrant was to punish, or to, first require the juvenile to respond to the allegation that he committed a crime, the crime of domestic violence against his mother. There was no contemplation in the late hours of the evening, when Judge Vollbach reviewed the deputy's report, that removal from the home was necessary. . . .
>
> Only later when the [child-protection] petition . . . was filed did it become apparent to the [c]ourt that the issue of removal from the home for reasons having to do with the child['s] welfare, rather than to punish him, was perhaps necessary. There was a hearing on the 13th, Judge Vollbach decided that . . . staying in the home was contrary to the child's welfare, and ordered him removed, and appropriately made that finding in his order of November 13th.

The court further explained:

> [F]oster care is different from detention, and detention is for a purpose completely unrelated to foster care. And there was no reason, the statutes do not indicate, simply

> because a form has the possibility of checking a box, and failure to check the box means that you're forever precluded from making that finding.[5]
>
> These are essentially two different proceedings with two different purposes.
>
> The forms that are commonly used in all proceedings many of the boxes don't apply to all of the proceedings, and the reason that it wasn't checked on November 11th is it had no bearing on the November 11th proceedings.[6]

Defendant now appeals the circuit court's ruling.

This Court's review of circuit court decisions reversing defendant's administrative decisions is subject to the following standards of review set forth in *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 362-363; 891 NW2d 884 (2016):

> We review the circuit court's decision to determine whether it "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *City of Sterling Heights v Chrysler Group, LLC*, 309 Mich App 676, 681; 873 NW2d 342 (2015) (quotation marks and citation omitted). We review de novo the circuit court's interpretation and application of statutes. *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 702; 854 NW2d 509 (2014). On the other hand, an administrative agency's statutory interpretation is reviewed under the standard first enunciated in *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935):

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[5] In the November 11 order, Judge Vollbach did not check a box indicating that it was "**contrary to the welfare** of the juvenile to remain in the home . . . ."

[6] The circuit court also awarded attorney fees and costs because it found that the position taken by defendant was "exceedingly unreasonable." Defendant did not challenge this award in its application for leave to appeal. This Court granted leave "limited to the issues raised in the application and supporting brief." *Ayotte v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered March 5, 2018 (Docket No. 339090).

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [*In re Complaint of Rovas*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quotation marks and citations omitted; second alteration in original), quoting *Boyer-Campbell*, 271 Mich at 296-297.]

> "Respectful consideration" of an agency's statutory interpretation is not akin to "deference," at least as that "term is commonly used in appellate decisions" today. *Rovas*, 482 Mich at 108. While an agency's interpretation can be a helpful aid in construing a statutory provision with a "doubtful or obscure" meaning, our courts are responsible for finally deciding whether an agency's interpretation is erroneous under traditional rules of statutory construction. *Id*. at 103, 108.

"Title IV-E establishes federal funding to support state foster care systems and conditions funding on compliance with federal requirements." *In re Rood*, 483 Mich 73, 102; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); see also 42 USC 671(a). A state plan, to be eligible for funding, must "provide[] for foster care maintenance payments in accordance with section 672 . . . ." 42 USC 671(a)(1).[7] To be eligible for Title IV-E foster-care maintenance payments, the child must have been removed from the home of a relative

[7] "[I]n order to comply with federal requirements, [the Michigan] Legislature enacts and amends state statutes to mirror the federal

"into foster care," and the removal and foster-care placement must meet, and continue to meet, the requirements of 42 USC 672(a)(2). See 42 USC 672(a)(1).[8] 42 USC 672(a)(2) provides:

> The removal and foster care placement of a child meet the requirements of this paragraph if—
>
> (A) the removal and foster care placement are in accordance with—
>
> * * *
>
> (ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 671(a)(15) of this title for a child have been made;
>
> (B) the child's placement and care are the responsibility of—
>
> (i) the State agency administering the State plan approved under section 671 of this title;
>
> (ii) any other public agency with which the State agency administering or supervising the administration of the State plan has made an agreement which is in effect; or
>
> (iii) an Indian tribe or a tribal organization (as defined in section 679c(a) of this title) or a tribal consortium that has a plan approved under section 671 of this title in accordance with section 679c of this title; and
>
> (C) the child has been placed in a foster family home or child-care institution.

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scheme and now provides that Title IV-E prevails to any extent that it conflicts with state law. 2008 PA 248, § 559." *In re Rood*, 483 Mich at 103-104.

[8] Additionally, the child, while in the relative's home, must have met the "AFDC eligibility requirement" in 42 USC 672(a)(3). This requirement is not at issue in this appeal.

At issue in this case is the requirement in 42 USC 672(a)(2)(A)(ii) that the removal and foster-care placement be in accordance with a judicial determination that continuation in the home from which the child was removed would be contrary to the welfare of the child. The Code of Federal Regulations addresses this requirement. 45 CFR 1356.21(c), entitled "*Contrary to the welfare determination*," provides that "[t]he contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care." Similarly, as noted, Michigan's FOM 902, entitled "Funding Determinations and Title IV-E Eligibility," stated, in part, that "[f]ederal regulations require the court to make a contrary to the welfare or best interest determination **in the first court order removing the child from his/her home** for title IV-E eligibility. The court order must coincide with removal of the child."[9]

Defendant contends that the November 11, 2014 detention order constituted the first court ruling that sanctioned or pertained to the child's removal from the home. Defendant argues that 42 USC 672(a) does not limit the requirement for a contrary-to-the-welfare

[9] FOM 902 was amended in February 2017 and currently provides, in relevant part, that "[f]ederal regulations require the court to make a contrary to the welfare or best interest determination **in the first signed court order prior to removing the child from his/her home** for title IV-E eligibility. The court order must coincide with removal of the child." Michigan Department of Health and Human Services, *Children's Foster Care Manual*, FOM 902, FOB 2017-002 (February 1, 2017), p 19, available at <https://perma.cc/V9CG-R9B2>.

finding to only a removal order in a child-protection proceeding, and it maintains that 45 CFR 1356.21(c) makes no distinction between removal orders for delinquency purposes and removals for child-protection purposes. Under defendant's reading, in order for funding to be applicable, the judge entering the temporary detention order would have needed to make a contrary-to-the-welfare determination even though the sole purpose of that order was to place the child in detention for committing a criminal act.

Plaintiff argues that this reading ignores the plain language of 42 USC 672(a), the provision that 45 CFR 1356.21(c) implements, which, according to plaintiff, only requires a court to make the requisite Title IV-E eligibility finding when a child is removed from the home *into foster care*. Plaintiff argues that funding is not dependent on a contrary-to-the-welfare finding having been made when the detention order was issued in the present case because the detention order did not place plaintiff into foster care. We agree.

The Michigan Supreme Court recently reiterated the rules of statutory interpretation in *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 335-336; 915 NW2d 338 (2018):

> When interpreting a statute, this Court's primary goal is to " 'ascertain the legislative intent that may reasonably be inferred from the words in [the] statute.' " If the statute's language is clear and unambiguous, then the statute must be enforced as written. A necessary corollary of this principle is that a " 'court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' "
>
> This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its

> placement and purpose in the statutory scheme, to avoid rendering any part of the statute nugatory or surplusage. [Citations omitted.]

As noted in *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543, 559; 909 NW2d 495 (2017), "a word or phrase in a statute must not be read in a vacuum; it must be harmonized with the whole statute. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). Thus, '[a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context.' *Id*." See also *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("Individual words and phrases, while important, should be read in the context of the entire legislative scheme.").

The plain language of 42 USC 672(a)(1) indicates that the state shall make foster-care maintenance payments on behalf of a child who has been removed from the home of a specified relative *into foster care*. The statute links the concept of "removal" to the placement setting, i.e., foster care. "*Foster care* means 24-hour substitute care for children placed away from their parents or guardians and for whom the title IV-E agency has placement and care responsibility." 45 CFR 1355.20(a). Foster-care maintenance payments may be made only on behalf of an eligible child who is in a foster-family home or in a childcare institution. 42 USC 672(b)(1) and (2). In addition, the statutory scheme specifically excludes "detention facilities" from the definition of a childcare institution. 42 USC 672(c).

Plaintiff was not removed from the home and placed into foster care by way of the November 11, 2014 order; rather, he was apprehended and placed into a juvenile-detention facility because of alleged criminal acts.

Consequently, the requirement that the state obtain a judicial determination that it was contrary to the welfare of the child to remain in the home for purposes of Title IV-E foster-care funding eligibility was not triggered at this point. It was the November 13, 2014 order that indicated that plaintiff's removal from the home and into care was justified on the basis of adverse family circumstances. This order contained the requisite language, and therefore plaintiff is eligible for Title IV-E foster-care funding. This reading is consistent with a decision reached by the United States Department of Health and Human Services Departmental Appeals Board in *Virginia Dep't of Social Servs*, DAB No. 2379 (2011) (Docket No. A-11-21).[10]

Citing the Federal Register, defendant argues that there is "no distinction about the type of order in which the contrary to the welfare determination is required" and thus contends that the determination needed to be included in the temporary detention order. The full context of the cited passage is as follows:

> *Comment:* Several commenters requested that we clarify that we did not intend to consider an emergency order (sometimes referred to as a "pick-up order" or "ex-parte order") as the first court ruling for the purpose of meeting the contrary to the welfare requirements.
>
> *Response:* We did not make any distinction about the type of order in which the contrary to the welfare determination is required. We mean the very first court order pertaining to the child's removal from home. If the emergency order is the first order pertaining to a child's removal from home, then the contrary to the welfare determination must be made in that order to establish title IV-E eligibility. We understand that some States must change their practices and even State statutes to meet this requirement. The

[10] Available at <https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2011/dab2379.pdf> [https://perma.cc/UDB8-JZKS].

> critical nature of this protection requires us to maintain this policy. [65 Fed Reg 4020, 4055 (January 25, 2000).]

In its earlier published notice of rulemaking, the Administration for Children and Families (ACF) proposed drawing a distinction between emergency and nonemergency removals with respect to the contrary-to-the-welfare determination. 63 Fed Reg 50058, 50094 (September 18, 1998). The proposed language was as follows:

> (c) *Contrary to the welfare determination*. Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interests, of the child.
>
> (1) *In nonemergency situations*. When a child is removed from home pursuant to a court order, the court must make the "contrary to the welfare" determination prior to the removal of the child from home. The judicial determination must be documented in the court order which removes the child from home. If such a judicial determination is not made prior to the removal, the child is not eligible for title IV-E foster care maintenance payments for the duration of his/her stay in foster care.
>
> (2) *In emergency situations*. When it is necessary to remove a child from home prior to obtaining a court order, the "contrary to the welfare" determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding "contrary to the welfare" is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E foster care maintenance payments for the duration of his/her stay in foster care. [*Id*.]

The ACF received many comments about the emergency/nonemergency distinction. 65 Fed Reg 4020, 4054 (January 25, 2000). "The comments were similar

to those . . . received regarding reasonable efforts to prevent removals; that the distinction is not consistent with actual practice in many States." *Id*. The ACF stated:

> We concur and have removed the distinction between emergency and non-emergency removals in the final rule. Now a State will need to obtain a contrary to the welfare determination in the first court order removing the child from the home, regardless of whether there is an emergency or non-emergency situation. [*Id*.]

Given the history of the proposed regulation, the ACF's response in 65 Fed Reg 4020, 4055 on which defendant relies should not be read as a blanket statement that any and all orders that remove a child from his or her home qualify as the first removal order for purposes of Title IV-E funding. The ACF was explaining that it had abandoned drawing a distinction between emergency and nonemergency orders in the context of removing a child into foster care.

The ACF also explained the rationale underlying the position taken in the regulation that the contrary-to-the-welfare determination be made in the first removal order:

> *Comment:* Commenters overwhelmingly opposed our proposed requirement that contrary to the welfare determinations be made at the first hearing pertaining to the child's removal from home. The commenters said we were inappropriately overturning policy established by the Departmental Appeals Board (DAB) decision #1508, which permitted States up to six months to obtain a contrary to the welfare determination.
>
> *Response:* We recognize that some States may have made changes to their contrary to the welfare policies based on this DAB decision. However, at the time that the DAB made that ruling, the Department did not have regulations addressing the timing of contrary to the welfare determi-

> nations. Therefore, we are now taking this opportunity to clarify in regulation our policy on this issue. Our reasons for establishing this policy are set forth below:
>
> > The contrary to the welfare determination was the first of the existing protections afforded to children and their families by the Federal foster care program and has been in effect since the inception of the program in 1961 when it was operated under title IV-A. The statute then, and now, recognizes the severity of removing a child, even temporarily, from home. This protection is in place because Congress believed that judicial oversight would prevent unnecessary removals and act as a safeguard against potential inappropriate agency action. This policy is consistent with Congressional intent and stands as proposed in the [Notice of Proposed Rulemaking]. The contrary to the welfare determination must be made in the first court order sanctioning the removal of the child from home, as is explicitly required at section 472(a)(1) of the Act. [65 Fed Reg 4020, 4054-4055.]

The ACF's response places the entire question squarely in the context of the federal foster-care program. The ACF explains that the requirement that a determination be made that it is contrary to the welfare of a child to remain in the child's home is intended to prevent unnecessary removals and placement into substitute care. This is predicated on the recognition that removal has severe consequences, even if it is temporary. See, e.g., *O'Donnell v Brown*, 335 F Supp 2d 787, 820 (WD Mich, 2004) ("The fundamental constitutional right to family integrity extends to all family members, both parents and children."). The first-order requirement is intended to act as a check on removing a child into foster care.

What happened in the case at hand is consistent with the aims of the first-order requirement. In the early morning hours of November 11, 2014, Judge Vollbach was faced with a situation that needed

immediate attention. The police had been dispatched to plaintiff's home, and both plaintiff and his mother were taken into custody. Judge Vollbach ordered that plaintiff be temporarily detained, pending a preliminary hearing. Thereafter, defendant learned that plaintiff's father was unavailable as a caregiver and also reported that "[Child Protective Services] history on [plaintiff's mother] has a consistent trend of substance abuse by [her]." Accordingly, defendant filed its petition, and the court concluded that remaining in the home was contrary to plaintiff's welfare. This time line evidences a process that advances the goal of avoiding unnecessary removals. Defendant did not act reflexively and immediately recommend removal from the home. Rather, it undertook an investigation before filing its removal petition. As for the importance of judicial oversight, in our opinion, waiting to consider whether remaining in the home is contrary to a child's welfare until an investigation has determined the facts of the situation balances the goal of preventing unnecessary removals and placement into substitute care with the goal of identifying what is in a child's best interests. Indeed, mandating that a court make the contrary-to-the-welfare determination before it is sufficiently apprised of the situation would actually obscure the severity of removal and turn the safeguard of judicial oversight into a means of jeopardizing the child's welfare.

Defendant cites the following question and answer taken from the Federal Child Welfare Policy Manual:

> **Question 2.**
>
> For purposes of meeting the section 472(a)(2)(A)(ii) eligibility requirement, must a temporary detention order include "contrary to the welfare" language or is it possible

> to consider a later delinquency adjudication order or dependency adjudication order as the removal order?
>
> **Answer**
>
> The statute requires that the "removal" from the home must occur as the result of a judicial determination to the effect that continuation therein would be contrary to the child's welfare.
>
> Therefore, such a determination must be made in the order that results in the removal of the child from the home. Since the child has already been removed from his home and is in detention as the result of a temporary detention order, the later hearing order only sanctions that removal. A child would remain ineligible during the entire foster care placement if the "contrary to the welfare" determination is not made at the time of the temporary detention order.[11]

How the ACF's answer is understood depends on how the question is understood. If the question presumes that placement in a detention facility or a psychiatric hospital is a temporary step undertaken by a court that has already determined that the child should be placed in foster care, then the answer is consistent with our interpretation of 42 USC 672. Take, for example, a situation in which a court determines that a child is a threat to himself or herself, so placement in a detention center or psychiatric hospital before placement in a foster-care home is appropriate.[12] If the question does not presume a predetermination of foster-care placement, then the answer supports the

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[11] United States Department of Health and Human Services, Administration for Children & Families, Children's Bureau, *Child Welfare Policy Manual*, § 8.3A.6, available at <https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=37> (accessed October 23, 2018) [https://perma.cc/3SNN-F8JN].

[12] See, e.g., *id*. at § 8.3A.1 ("A court order indicating that the child is a threat to himself satisfies the requirement of a determination that remaining in the home would be contrary to the child's welfare.").

interpretation advanced by defendant. Given the purpose of Title IV-E funding, we find it reasonable to assume that the question includes the presumption. In this case, Judge Vollbach did not find foster-care placement necessary until the issuance of the order on November 13, 2014, and appropriately, at that time, made a contrary-to-the-welfare finding such that Title IV-E payments are available.

Defendant also cites the following question and answer taken from the manual:

> **Question 2.**
>
> How should the State establish title IV-E eligibility for a child who is temporarily placed in a facility that is considered outside the scope of "foster care," such as a detention facility or psychiatric hospital, prior to his/her placement in foster care? When may the State begin to claim for such child if s/he is placed in foster care?
>
> **Answer**
>
> The State must comply with the title IV-E eligibility criteria as set forth in the statute at section 472(a) of the Social Security Act (the Act) and the implementing regulations at 45 CFR 1356.21(b), (c), and (d). The State must establish the child's eligibility at removal (which includes meeting the Aid to Families with Dependent Children eligibility requirements as in effect on July 16, 1996 and judicial determinations as to the effect that it is contrary to the child's welfare to remain in the home and that reasonable efforts were made to prevent such removal) even for children who are not initially placed in a foster care setting. Title IV-E is an entitlement program and, as such, no flexibility exists with respect to satisfying the requisite eligibility criteria. If such eligibility criteria are not satisfied within the time frames prescribed in the regulation, the child is ineligible for title IV-E funds.

Conversely, the conclusion that temporary detention is warranted because a child might run away does not constitute a contrary-to-the-welfare determination. *Id*.

> When the child is transferred to a facility that meets the requirements of section 472(c) of the Act, Federal financial participation is available from the first day of placement in the month in which all title IV-E eligibility requirements are met.[13]

Again, this question seems to presume that the placement in a detention facility or a psychiatric hospital is a temporary step undertaken by a court that has already determined that the child should be placed in foster care. Foster-care maintenance payments would not be reimbursable during the child's placement in a nonfoster-care setting, but foster-care maintenance payments would be reimbursable from the first day of placement in the month when the child was transferred to a facility that meets the statutory requirements, as long as the other Title IV-E eligibility requirements are met. In this case, there was no determination of the necessity for foster care until the November 13, 2014 order; accordingly, the first order pertaining to removal into foster care contained the requisite language for Title IV-E eligibility.

Lastly, defendant cites the following additional question and answer from the manual:

> **Question 2.**
>
> If a temporary detention order states that the child is to be detained until sentencing because there is reason to believe he would run away, would this satisfy the requirement for a determination regarding "contrary to the welfare?"
>
> **Answer**
>
> No. This language could not be construed to mean that to continue in the home would be "contrary to the (child's) welfare." It is important to remember that the judicial determinations required for title IV-E eligibility were

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[13] *Id.* at § 8.3A.4.

> intended to ensure that children were not removed from their homes unnecessarily. In juvenile justice procedures, where children are removed for correctional purposes, the courts must determine that continuation in the home would be contrary to the child's welfare if title IV-E eligibility is to be established.[14]

This answer merely states that a child's being at risk of running away is insufficient to meet the "contrary to the welfare" requirement. In the present case, Judge Vollbach explicitly found that it would be contrary to plaintiff's welfare to be returned home, and he made this finding in the first order pertaining to plaintiff's removal *into foster care*.

The statutory scheme and agency interpretations align with the ruling of the trial court, and we do not find defendant's arguments to the contrary persuasive.

Affirmed.

K. F. KELLY and GLEICHER, JJ., concurred with METER, P.J.

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[14] *Id*. at § 8.3A.1.

MENHENNICK TRUST v MENHENNICK

Docket No. 342391. Submitted October 2, 2018, at Marquette. Decided November 27, 2018, at 9:10 a.m.

The Menhennick Family Trust, the Ilean Menhennick Irrevocable Trust, and others filed an action in the Marquette Circuit Court against Timothy Menhennick, challenging as invalid the proxies defendant had obtained from his mother, Ilean Menhennick, for voting rights in Menhennick Enterprises, Inc., and Harvey Oil Company, Inc., and challenging various actions taken by defendant after obtaining the proxies. The ownership shares in Menhennick Enterprises, Inc., and Harvey Oil Company, Inc., were owned in equal parts by the Menhennick Family Trust and the Ilean Menhennick Irrevocable Trust. Ilean Menhennick gifted through her irrevocable trust an equal amount of shares in the companies to each her of five children, including defendant, but Ilean retained the largest voting share for each company. In December 2013, defendant obtained proxies from Ilean to vote her shares at the annual shareholders' meeting, giving him a controlling interest in each company. Defendant thereafter amended the bylaws to provide for a single-member board of directors with himself as the sole director and issued and purchased additional shares in each company, making him the majority shareholder in each company independent of the proxies. Plaintiffs challenged the proxies signed by Ilean, arguing that the proxies were invalid because Ilean was incompetent when she signed them. Following a bench trial, the court, Karl A. Weber, J., concluded that Ilean lacked the mental capacity to grant the proxies, determined that defendant breached his fiduciary duties to the companies and shareholders, declared the proxies and subsequent amendments of the bylaws void, and ordered the parties returned to the *status quo ante*. Defendant appealed.

The Court of Appeals *held*:

1. MCL 450.1421(6) provides that the authority of the holder of a proxy to act is not revoked by the incompetence or death of the shareholder who executed the proxy unless, before the authority is exercised, written notice of an adjudication of the incompetence or death is received by the corporate officer respon-

sible for maintaining the list of shareholders. In other words, MCL 450.1421(6) requires that notice of death or incompetence be given to the appropriate corporate officer before a proxy is deemed revoked by the death or incompetence of the shareholder; Subsection 6 does not address the initial validity of a proxy and does not affect the authority of a court to declare an invalid proxy void.

2. In general, an individual may enter into a valid contract of agency; that is, the individual may delegate to an agent whatever a person may lawfully do in his or her own right and on his or her own behalf. An individual has the mental capacity to enter into such a contract if the individual possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the individual is engaged. A person is mentally unsound to contract if the person had no reasonable perception of the nature or terms of the contract. An individual may be capable of conducting business successfully and still be mentally competent; that a person is capable of understanding the nature and effect of signing one document does not necessarily mean that the person could understand the nature and effect of a different business document. In this case, because there was substantial evidence of Ilean's incompetence when she signed the proxies, the trial court did not clearly err by concluding that Ilean lacked the capacity to understand the nature and effect of the proxies. Just because Ilean was able to adequately understand the nature of the power-of-attorney and patient-advocate documents she signed in June 2013 did not necessarily mean that she was able to understand the nature and effect of the proxies in December 2013. The trial court did not err by voiding the proxies on the basis of Ilean's incompetence.

Affirmed.

CONTRACTS — MENTAL CAPACITY TO CONTRACT — PROXIES — STATUTORY NOTICE OF INCOMPETENCE OR DEATH — COURT AUTHORITY TO VOID INVALID PROXY.

MCL 450.1421(6) provides that the authority of the holder of a proxy to act is not revoked by the incompetence or death of the shareholder who executed the proxy unless, before the authority is exercised, written notice of an adjudication of the incompetence or death is received by the corporate officer responsible for maintaining the list of shareholders; MCL 450.1421(6) requires that notice of death or incompetence be given to the appropriate corporate officer before a proxy is deemed revoked by the death or incompetence of the shareholder; Subsection 6 does not address the initial validity of a proxy and does not affect the authority of a court to declare an invalid proxy void.

Graybill & Mead, PLLC (by *Richard M. Graybill*) for plaintiffs.

Knaggs Brake, PC (by *David R. Brake*) for defendant.

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM. This case presents a question of first impression, namely whether MCL 450.1421(6) precludes voiding a shareholder's proxy on the basis of incompetence when the shareholder had not been declared incompetent before the proxy was given. We conclude that it does not.

Plaintiff Harvey Oil Company, Inc., is a home-heating fuel business that primarily sells fuel oil and propane. It also operates convenience stores with gas stations. When created, Harvey Oil issued 130 shares of stock, which were jointly owned by Alva and Ilean Menhennick. Their children, Gary, Dennis, Paul, Patrick, and Timothy, all worked in the business at one time or another. Dennis took over as general manager after Alva's death in January 1993. Around that time, some of the assets of Harvey Oil were spun off into a new company, Menhennick Enterprises, Inc. One hundred and thirty shares of stock were also issued for Menhennick Enterprises. Sixty-five shares of each company were held by the Menhennick Family Trust and 65 shares of each company were held by the Ilean Menhennick Irrevocable Trust. Thereafter, Ilean, through her trust, made gifts of 10.4 shares of each company to each of her five sons. After Gary's death in 2000, his shares were transferred back to the trust.

A dispute arose over the voting of the shares held by the Menhennick Family Trust, of which Paul and Ilean were cotrustees. This dispute was resolved by the

probate court in 2008 when it ruled that each cotrustee would vote half the shares held by the Menhennick Family Trust. Accordingly, from 2008 until 2013, for each company, Ilean voted 55.9 shares of the 130 shares outstanding held by each of the two trusts, Paul voted 42.9 shares (32.5 shares held by the trust and 10.4 shares held by him individually), while Dennis, Timothy, and Patrick each voted 10.4 shares held by themselves.

Other disputes continued through the years regarding the management of the companies and whether to sell assets. The basis for the instant dispute arose when defendant, Timothy Menhennick, obtained proxies from Ilean on December 11, 2013, in advance of the annual shareholders' meeting on December 12. This gave defendant the power to vote 66.3 shares of the 130 shares for each company. In other words, defendant now had majority control. Defendant used this power to amend the bylaws to provide for a single-member board of directors with himself as the sole director. Defendant subsequently issued an additional 110 shares in both companies, which he purchased, making him the majority shareholder in each company even without the shares he voted by proxy.

This eventually led to the instant lawsuit, filed in 2015, challenging various actions taken by defendant, including the bylaw amendment and the issuance of the additional stock. At the heart of the dispute was defendant's obtaining Ilean's proxies. Plaintiffs argue that the proxies were invalid because Ilean was incompetent when she signed them. Defendant moved to preclude the attack on the proxies because Ilean had not been previously adjudged incompetent before she signed the proxies. The trial court denied the motion. Later, following a bench trial, the court concluded that

Ilean had lacked the mental capacity to grant the proxies. The court also determined that defendant had exercised undue influence over Ilean to obtain the proxies. The court additionally concluded that defendant had breached his fiduciary duties to the companies and the shareholders. The court declared the proxies void, as well as the amendment of the bylaws. It ordered the parties returned to the relative interests they owned before the proxies were issued. Defendant now appeals and we affirm.

The principal issue in this case is the effect of MCL 450.1421(6) on the challenge to the validity of the proxies. That statute provides as follows:

> The authority of the holder of a proxy to act is not revoked by the incompetence or death of the shareholder who executed the proxy unless, before the authority is exercised, written notice of an adjudication of the incompetence or death is received by the corporate officer responsible for maintaining the list of shareholders.

Defendant argues that under this provision, Ilean's incompetency cannot be the basis for holding the proxies invalid because she was not adjudicated incompetent and the required notice given of that fact before the proxies were exercised. Plaintiffs argue that this provision does not restrict the ability to challenge whether the proxies were valid in the first place. We agree with plaintiffs.

We review de novo issues of statutory and contractual interpretation. *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014). The flaw in defendant's argument is that the question in this case is not whether Ilean's incompetency operated to revoke the proxies; rather, it is whether the proxies were void *ab initio* because of her incompetency. The purpose of MCL 450.1421(6) appears to be to link a notice require-

ment to the basic principle that the death or incompetence of a principal revokes the authority of the agent. See, e.g., *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004) ("It is also well-settled that the death of the principal revokes the authority of the agent . . . ."). That is, MCL 450.1421(6) requires that notice of death or incompetence be given to the appropriate corporate officer before a proxy is deemed revoked by the death or incompetence of the shareholder. But, more importantly to the resolution of this case, MCL 450.1421(6) does not address the initial validity of a proxy or the authority of a court to declare an invalid proxy void.

In sum, MCL 450.1421(6) does not restrict the trial court's authority to determine that the proxies were never validly issued in the first place. Accordingly, we must turn to defendant's next argument, that the trial court erred by finding that Ilean was incompetent at the time she executed the proxies. We are not persuaded that the trial court clearly erred.

We review for clear error the trial court's findings of fact following a bench trial and review de novo its conclusions of law. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011). A finding is clearly erroneous if there is no evidentiary support for the finding or, after reviewing the entire record, this Court is definitely and firmly convinced that the trial court made a mistake. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). This Court gives "due regard to the special opportunity of the [trial] court to judge the credibility of the witnesses who appeared before it . . . ." *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

Whether a person was mentally competent is determined by a preponderance of the evidence.

In re McIntyre Estate, 355 Mich 238, 248; 94 NW2d 208 (1959). Generally, "whatever a person may lawfully do if acting in his own right and on his own behalf he may lawfully delegate to an agent . . . ." *Link, Petter & Co v Pollie*, 241 Mich 356, 359-360; 217 NW 60 (1928). However, in order to do so, the person "must be free to enter into a valid contract of agency." *Id*. at 360. "The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged." *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993). A person is mentally unsound to contract if "the person had no reasonable perception of the nature or terms of the contract." *Id*. A person may be incapable of conducting business successfully and still be mentally competent. *Id*. at 333.

Testimony was offered by family members and Ilean's physicians. Dr. Amy Fletemier, Ilean's family physician, testified that in April 2013, Ilean had difficulty following directions to do basic and simple things. Dr. Roman Politi, a neurologist, testified that Ilean could not recall three words after a minute. Dr. Fletemier also testified that Ilean was diagnosed with moderate dementia in May 2013, which Dr. Fletemier described as a "pretty significant impairment" and only "moderate" in comparison to severe dementia, which renders a person nonverbal and unable to function. Patrick described his mother as talking to people who were not there, and he stated that she could not correctly place a phone call even while looking at the written phone number.

Defendant testified that Ilean read the proxies and signed them. He did not recall discussing the proxies with Ilean the day she signed them, and he did not

recall her asking questions. Defendant believed that Ilean understood that if she signed the proxies, she would not have to attend the shareholders' meeting.

Patrick testified that on the day after the shareholders' meeting when asked if she had signed a proxy, Ilean only knew that she had signed some papers for the business. Dr. Fletemier saw Ilean less than two weeks later. At that time, Ilean's "talk was very vague." She could not interact in a complex conversation. She was not capable of complex thought. Dr. Fletemier testified that one of Ilean's issues was "severe memory impairment," such that Ilean had a limited ability to even recall the events of her day-to-day routine. Dr. Fletemier testified that Ilean likely could not have "[understood] business complexities with a moderate dementia." Dr. Fletemier testified that while Ilean may have been able to sign her name to a document, "would she truly understand it? No." Ilean would not have been able to understand a business meeting to the extent that she would have been able to decide whether she was comfortable having someone else make decisions for her. In her condition, Ilean would not necessarily have understood proxies and voting ramifications, and she even might not have understood the concept of voting.

The trial court determined that Ilean lacked the mental capacity to understand the nature of the proxies she signed. Specifically, it determined that Ilean could not have understood the ramifications of what she had signed and that the day after the meeting, Ilean did not understand what she had signed or the ramifications of naming defendant as her agent. Accordingly, the trial court determined that Ilean had lacked the capacity to understand the nature and effect

of the proxies she signed when Timothy presented them to her the day before the shareholders' meeting.

We are not persuaded that the trial court clearly erred. There was substantial evidence of Ilean's incompetence. Moreover, even if the trial court accepted defendant's testimony as true, the testimony did not establish that Ilean understood that the proxy agreements meant that defendant would vote for her at the shareholders' meeting. Defendant testified that he believed Ilean understood that if she signed the proxies, she would not have to attend the shareholders' meeting. This is not the same as understanding that by signing the proxies, Ilean would be allowing Timothy to vote for her at the meeting. Nor are we persuaded by defendant's argument that Ilean's ability to execute a power of attorney and patient-advocate documents in June 2013 established her competency. First, competency in June does not mean that Ilean was competent in December. Indeed, there was testimony that Ilean's condition had rapidly deteriorated in the second half of 2013. Second, the nature of the documents is different. Just because she could adequately understand the nature of the power-of-attorney and patient-advocate documents and was competent to execute them does not necessarily mean that she could understand the nature and effect of the proxies.

Because we have concluded that there was an adequate basis for the trial court to void the proxies on the basis of incompetence, we need not address defendant's argument that the trial court erred by finding undue influence. Similarly, we need not address defendant's arguments regarding the trial court's alternative findings regarding breach of fiduciary duties, failure to provide information to the shareholders, and the issuance of the additional stock for defendant's pur-

chase. Because we affirm the trial court's determination that the proxies were void, all actions taken by defendant at the December 2013 shareholders' meeting and thereafter are invalid. That is, the trial court properly ruled that the parties were to be returned to the *status quo ante*.

Affirmed. Plaintiffs may tax costs. MCR 7.219.

MURPHY, P.J., and SAWYER and SWARTZLE, JJ., concurred.

PEOPLE v WILLIAMS

Docket No. 339701. Submitted October 10, 2018, at Detroit. Decided October 23, 2018. Approved for publication November 29, 2018, at 9:00 a.m. Reversed and remanded 505 Mich 1013 (2020).

In 1987, Ronald Williams was convicted following a jury trial in the Wayne Circuit Court of first-degree murder, MCL 750.316, second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant, who was a juvenile at the time he committed the crimes, was sentenced to mandatory life imprisonment without the possibility of parole for his first-degree murder conviction, life with the possibility of parole for his second-degree murder conviction, and a consecutive two years of imprisonment for his felony-firearm conviction. In 2016, following the United States Supreme Court's invalidation of mandatory life sentences without parole for juvenile offenders in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), the prosecution filed a notice of intent to seek a term-of-years sentence for defendant's first-degree murder conviction. In December 2016, the trial court resentenced defendant to 25 to 60 years' imprisonment for the first-degree murder conviction, leaving the other two sentences intact. Defendant moved for relief from judgment, arguing that he was entitled to resentencing for his second-degree murder conviction because his sentence of life with the possibility of parole was also invalidated by *Miller* and *Montgomery*. The court, Bruce U. Morrow, J., agreed and granted defendant's motion. The prosecution appealed.

The Court of Appeals *held*:

1. MCR 6.508(D)(3)(b) provides, in pertinent part, that the court may not grant a defendant's motion for relief from judgment if the motion alleges grounds for relief, other than jurisdictional defects, that could have been raised on appeal from the conviction and sentence or in a prior motion under MCR 6.508(D) unless the defendant demonstrates actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(b)(iv) provides that "actual prejudice" means that, in the case of a challenge to the sentence, the sentence is invalid. In this case,

defendant did not establish actual prejudice. Because *Miller* and *Montgomery* apply only to mandatory sentences of life *without* the possibility of parole, *Miller* and *Montgomery* do not invalidate a juvenile's sentence of life *with* the possibility of parole. *Miller* held that a state is not required to guarantee eventual freedom but must provide a juvenile offender some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Because defendant was eligible for parole on each of his sentences following his resentencing in 2016, defendant was granted a meaningful opportunity to obtain release. Accordingly, defendant's sentence of life with the possibility of parole was not invalid under *Miller*, and defendant was not entitled to resentencing. The trial court erred by granting defendant's motion.

2. Defendant's argument that his life sentence was invalid because it was based on inaccurate information and a misconception of the law was without merit. Defendant premised his argument on the original sentencing court's mistaken belief that defendant's first-degree murder conviction mandated a sentence of life without parole and that defendant would spend the rest of his life in prison, which he argued meant that the trial court necessarily gave less thoughtful consideration to his sentence for second-degree murder. However, this argument was purely speculative. Defendant provided no argument grounded in fact to support his contention that his sentence for first-degree murder had an effect on his sentence for second-degree murder.

3. The trial court erred when it held that it was obligated to resentence defendant on all of his remaining convictions because defendant's life-without-parole sentence was invalidated. The trial court erroneously relied on *People v Jackson*, 487 Mich 783 (2010), for the contention that "where there are multiple counts within a single judgment of sentence and one or more counts are reversed (or in this case resentencing to a term of years) a Defendant must be resentenced on the remaining counts." *Jackson* made no such holding and in no way suggested that trial courts may alter otherwise valid sentences. Furthermore, defendant's reliance on *United States v Tucker*, 404 US 443 (1972), and *People v Moore*, 391 Mich 426 (1974), was misplaced. Defendant employed those cases to argue that one invalid *sentence* in a judgment of sentence invalidates all other sentences in that judgment of sentence; however, those cases dealt with sentences that contemplated invalid prior *convictions*. Accordingly, defendant failed to establish that the trial court had authority to set aside his sentence for second-degree murder.

4. Defendant was not entitled to resentencing under MCL 771.14(2)(e)(*ii*) because, by its plain language, that provision does not apply to defendant. MCL 771.14(2)(e)(*ii*) applies to a person to be sentenced under the sentencing guidelines set forth in Chapter XVII of the Code of Criminal Procedure. Defendant was sentenced in 1987, and Chapter XVII of the Code of Criminal Procedure was not effective until December 15, 1998. Defendant was resentenced for his first-degree murder conviction under MCL 769.25a, which is part of Chapter IX of the Code of Criminal Procedure; therefore, defendant was never sentenced under the sentencing guidelines set forth in Chapter XVII of the Code of Criminal Procedure.

Reversed and remanded for entry of an order denying defendant's motion for relief from judgment.

CRIMINAL LAW — JUVENILE OFFENDERS — SENTENCES OF LIFE WITH THE POSSIBILITY OF PAROLE ARE NOT INVALID UNDER *MILLER* AND *MONTGOMERY*.

The United States Supreme Court invalidated mandatory life sentences without parole for juvenile offenders in *Miller v Alabama*, 567 US 460 (2012), and also held that a state is not required to guarantee eventual freedom but must provide a juvenile offender some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation; *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), held that *Miller* applies retroactively to juvenile offenders; because *Miller* and *Montgomery* apply only to mandatory sentences of life without the possibility of parole for juvenile offenders, *Miller* and *Montgomery* do not invalidate a juvenile offender's sentence of life with the possibility of parole.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Lindsay Ponce*) for defendant.

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. The prosecution appeals by leave granted[1] the trial court's order granting defendant's motion for relief from judgment. We reverse.

I. FACTUAL BACKGROUND

In 1987, following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant, who was a juvenile at the time he committed the crimes, was sentenced to mandatory life imprisonment without the possibility of parole for his first-degree murder conviction, life with the possibility of parole for his second-degree murder conviction, and a consecutive two years' imprisonment for his felony-firearm conviction.

Following the United States Supreme Court's invalidation of mandatory life sentences without parole for juvenile offenders in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the prosecution filed a notice of intent to seek a term-of-years sentence for defendant's first-degree murder conviction. On December 2, 2016, the trial court resentenced defendant to 25 to 60 years' imprisonment for the first-degree murder conviction, leaving the other two sentences intact. Defendant later filed a motion for relief from judgment in which he argued that he was entitled to resentencing on his second-degree murder conviction because his life-with-the-possibility-of-parole sentence was also invalidated by *Miller* and *Montgomery*. The trial court agreed. The prosecution now appeals that decision.

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[1] *People v Williams*, unpublished order of the Court of Appeals, entered September 28, 2017 (Docket No. 339701).

II. ENTITLEMENT TO RESENTENCING

The prosecution argues on appeal that the trial court lacked the authority to grant the substantive relief requested—resentencing—in defendant's motion for relief from judgment.[2] We agree. "We review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error." *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). Matters of constitutional and statutory interpretation are reviewed de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016).

MCR 6.508 governs the circumstances under which a trial court may grant a motion for relief from judgment:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> * * *
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and

[2] The prosecution also argues that the trial court erred by ignoring the mandate of MCR 6.504(B)(4). That rule states that if a trial court decides not to summarily dismiss a motion for relief from judgment, it "shall order the prosecuting attorney to file a response" before proceeding. MCR 6.504(B)(4). Here, the trial court failed to adhere to that mandatory directive and therefore erred. Yet we need not address this error at length because the prosecution's other claim of error is dispositive.

> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> * * *
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid.

The parties do not contest whether defendant established good cause under MCR 6.508(D)(3)(a), so we need not address that issue. The only issue before us is whether defendant established the second prong of the analysis—actual prejudice in the form of an *invalid* sentence. We conclude that he did not.

In the trial court defendant contended that his sentence of life with the possibility of parole for his second-degree murder conviction was constitutionally invalidated by *Miller* and *Montgomery*. Defendant also argued that when the trial court sentenced him on his second-degree murder conviction, it was operating under the assumption that "state laws mandating a juvenile die in prison were constitutional." Defendant speculated that if the trial court had been aware that defendant's mandatory life-without-parole sentence was unconstitutional, it likely would have given him a term-of-years sentence for his second-degree murder conviction. We first address defendant's argument that *Miller* and *Montgomery* invalidated his sentence for second-degree murder and conclude that neither case applies to defendant's sentence of life with the possibility of parole. We then address defendant's argument that he was sentenced on the basis of inaccurate information and misconceptions of law, and we ultimately conclude that the record does not support that assertion.

In *Miller*, the Supreme Court of the United States held that "mandatory life without parole for those

under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller*, 567 US at 465. The Supreme Court explained:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g.*, *Graham* [*v Florida*, 560 US 48, 78; 130 S Ct 2011; 176 L Ed 2d 825 (2010)] ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B. v. North Carolina*, 564 U. S. 261, 269 [131 S Ct 2394; 180 L Ed 2d 310] (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Miller*, 567 US at 477-478.]

The Supreme Court went on to clarify that " '[a] State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Id.* at 479, quoting *Graham*, 560 US at 75.

After *Miller*, "the Supreme Court recognized that the ruling . . . had resulted in some confusion and disagreement among various state courts about whether *Miller* applied retroactively." *People v Wiley*,

324 Mich App 130, 136; 919 NW2d 802 (2018). To resolve this confusion, the Supreme Court in *Montgomery* held that although "*Miller*'s holding ha[d] a procedural component" because it "require[d] a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," "*Miller* announced a substantive rule of constitutional law" that applied retroactively to juvenile offenders. *Montgomery*, 577 US at ___; 136 S Ct at 734, 736.

Against this backdrop, it is clear that, at a maximum, *Miller* and *Montgomery* guarantee that defendants convicted as juveniles are afforded " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Miller*, 567 US at 479, quoting *Graham*, 560 US at 75. At a minimum, the cases apply only to mandatory sentences of life without the possibility of parole.[3] See, e.g., *People v Wines*, 323 Mich App 343, 350; 916 NW2d 855 (2018) ("[T]he constitutional holding in *Miller* applied only in life-without-parole decisions."). Here, under either interpretation, defendant's sentence of life with the possibility of parole satisfied *Miller*'s mandate. Defendant once served a sentence of life without the

[3] We note that other jurisdictions have applied *Miller* to cases in which a term-of-years sentence constituted de facto life without parole. See, e.g., *Kelly v Brown*, 851 F3d 686, 687 (CA 7, 2017) ("*Miller* applies not just to sentences of natural life, but also to sentences so long that, although set out as a term of years, they are in reality a life sentence."). Defendant cites some of these cases to support his contention that *Miller* and *Montgomery* apply to sentences of life with the possibility of parole. But contrary to defendant's argument, none of the cases he cites dealt with a sentence of life with the possibility of parole; all the cited cases involved lengthy term-of-years sentences that were effectively life sentences without the possibility of parole. Clearly, a sentence of life *with* the possibility of parole is not a de facto sentence of life *without* the possibility of parole.

possibility of parole but is now eligible for parole on each of his sentences. Stated differently, defendant has been granted a meaningful opportunity to obtain release, see *Miller*, 567 US at 479, from his sentences for first- and second-degree murder. And because defendant has some meaningful opportunity to obtain release from his sentence of life with the possibility of parole, that sentence was not invalid under *Miller*.

Defendant briefly contends on appeal that obtaining parole in Michigan is more difficult for individuals serving life sentences than for individuals serving term-of-years sentences and that, therefore, defendant's life-with-the-possibility-of-parole sentence does not actually guarantee him a meaningful opportunity to obtain parole. Defendant's argument, however, is incomplete. While defendant explains that obtaining parole from a life sentence is more involved than obtaining parole from a term-of-years sentence, defendant fails to explain how the latter constitutes a meaningful opportunity to obtain release and the former does not. Defendant is not entitled to eventual freedom—only a meaningful opportunity to obtain it. *Id*.

We now turn to defendant's argument that his life sentence is invalid because it was based on inaccurate information and a misconception of the law. Defendant premises his argument on the original sentencing court's mistaken belief that defendant's first-degree murder conviction mandated a sentence of life without parole and that defendant would spend the rest of his life in prison. Defendant reasons that, because of this mistaken belief, the trial court necessarily gave less thoughtful consideration to defendant's sentence for second-degree murder. The glaring problem with this argument is that it is purely speculative. Defendant provides no argument grounded in fact to support his

contention that his sentence for first-degree murder had an effect on his sentence for second-degree murder. If anything, the original sentencing court's remarks—which the trial court quoted when granting defendant's motion for relief from judgment—suggest otherwise:

> I hope you understand that as it relates to Count One, I have no discretion, none. So, as it relates to Count One, it is the sentence of the Court that you be committed to the custody of the Michigan Corrections Commission with a sentence mandated by the statute, which is a life sentence with no eligibility for parole. And as it relates to Count Two, Murder in the Second Degree, the kindest sentence I can give to you is life. *You will be eligible for parole if you can get that first one off your back*. [Emphasis added.]

Clearly, the original sentencing judge understood that defendant's life sentence for second-degree murder afforded him a meaningful opportunity to obtain release, and thus, defendant's argument that the trial court would have sentenced him to something other than life for second-degree murder but for his mandatory life-without-parole sentence is speculative[4] and has no support in the record.

In support of its conclusions, the trial court also reasoned that because defendant's life-without-parole sentence was invalidated, the trial court was obligated to resentence defendant on all of defendant's remaining convictions.

In Michigan, "[t]rial courts ordinarily lack the authority to set aside a valid sentence." *People v Comer*, 500 Mich 278, 295 n 40; 901 NW2d 553 (2017). The trial court relied on *People v Jackson*, 487 Mich 783,

[4] Defendant even concedes the speculative nature of his argument in his brief on appeal: "[I]t is impossible to determine whether or not [the] sentencing court would have exercised its discretion differently absent the misconception of the law."

793-794; 790 NW2d 340 (2010), for the contention that "where there are multiple counts within a single judgment of sentence and one or more counts are reversed (or in this case resentencing to a term of years) a Defendant must be resentenced on the remaining counts." *Jackson* made no such holding, and it in no way suggests that trial courts may alter otherwise valid sentences. The trial court's reliance on the case was therefore misplaced.[5]

On appeal, defendant relies on *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972), superseded by statute on other grounds as stated in *United States v Irey*, 612 F3d 1160, 1180-1181 (CA 11, 2010), and *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974), in support of the trial court's conclusion that when a defendant is entitled to resentencing on one conviction, that defendant is entitled to resentencing as to all other related convictions. In *Tucker*, however, the defendant's sentence for armed robbery was affected by two previous convictions that were later found to be constitutionally invalid. *Tucker*, 404 US at 443-448. Because the armed-robbery sentence was based on invalid *convictions*, the sentence was invalid. *Id*. at 448. Again, in *Moore*,

[5] In *Jackson*, the defendant was convicted of armed robbery and two counts of felonious assault. *Jackson*, 487 Mich at 787. On appeal in this Court, the defendant's felonious-assault convictions were vacated, but the defendant's request for resentencing on the armed-robbery conviction was denied. *Id*. at 788-789. The Michigan Supreme Court reversed the sentencing decision because the defendant's minimum sentencing guidelines range had been determined based on the inaccurate belief that the defendant was guilty of felonious assault, and the defendant's acquittal on those two charges altered his guidelines range for armed robbery. *Id*. at 792-793. In no way does the case suggest that trial courts may alter otherwise valid sentences. Rather, the case necessarily determined that the defendant's armed-robbery sentence was based on inaccurate information and was thus invalid. *Id*. at 793.

the sentencing judge considered a prior conviction that was constitutionally invalid when it sentenced the defendant for possession of narcotics, and accordingly, the defendant was entitled to resentencing. *Moore*, 391 Mich at 439-440. Both *Moore* and *Tucker* dealt with sentences that contemplated invalid prior *convictions*, thus *invalidating* the sentences. Defendant employs these cases to argue that one invalid *sentence* in a judgment of sentence invalidates all other sentences in that judgment of sentence, but the cases do not support that contention. Therefore, defendant's argument is without merit. Defendant has thus failed to establish that the trial court had authority to set aside his valid sentence for second-degree murder.[6]

For all the reasons outlined above, defendant's life-with-parole sentence was a valid sentence, and the trial court lacked the authority to grant resentencing on the basis of defendant's motion for relief from judgment. The trial court's ruling to the contrary is reversed.

As an alternative argument, defendant contends that he is entitled to resentencing because now that his second-degree murder sentence is his controlling sentence, he was sentenced in violation of MCL 771.14(2)(e)(*ii*). Defendant argues that under that section, his presentence investigation report was required

[6] Even assuming arguendo that the trial court had the authority at the *Miller* resentencing to resentence defendant for all his convictions, not only to correct the invalid sentence, the issue is moot because the trial court did not exercise that authority. Neither the trial court nor the parties suggested altering defendant's life sentence for second-degree murder during resentencing on his first-degree murder conviction. Instead, the issue was raised in a subsequent motion for relief from judgment, wherein the court was inarguably limited by court rule and caselaw to granting relief only in the event of an invalid sentence. MCR 6.508(D)(3)(b)(*iv*); *Comer*, 500 Mich at 295 n 40.

to contain the recommended minimum guidelines range of his controlling sentence, which, in light of his resentencing, it did not.

> MCL 771.14(2) provides that a presentence investigation report must include
>
> (e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII, all of the following:
>
> * * *
>
> (*ii*) Unless otherwise provided in subparagraph (*i*), for each crime having the highest crime class, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.

Although this Court recently recognized in dicta that defendant's argument may have merit, see *Wines*, 323 Mich App at 358-359, we need not discuss defendant's argument in any detail. By its terms MCL 771.14(2)(e)(*ii*) applies to "a person to be sentenced under the sentencing guidelines set forth in chapter XVII . . . ." Defendant was sentenced in 1987, and Chapter XVII of the Code of Criminal Procedure was not effective until December 15, 1998. 1998 PA 317. Defendant was resentenced for his first-degree murder conviction under MCL 769.25a, which is part of Chapter IX of the Code of Criminal Procedure. Simply put, defendant was never "sentenced under the sentencing guidelines set forth in chapter XVII" of the Code of Criminal Procedure, so MCL 771.14(2)(e)(*ii*), by its plain terms, does not apply.

III. CONCLUSION

Defendant failed to show actual prejudice by establishing that his life sentence for second-degree murder was invalid. Thus, defendant was not entitled to resen-

tencing under his motion for relief from judgment, and the trial court erred by granting the motion. Defendant is also not entitled to resentencing under MCL 771.14(2)(e)(*ii*) because, by its plain language, that provision does not apply to defendant.

Reversed and remanded for entry of an order denying defendant's motion for relief from judgment. We do not retain jurisdiction.

O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

BROZ v PLANTE & MORAN, PLLC

Docket No. 340381. Submitted December 4, 2018, at Lansing. Decided December 11, 2018, at 9:00 a.m. Vacated in part and remanded 504 Mich 892 (2019).

Robert F. Broz and Kimberly Broz filed an action in the Otsego Circuit Court against Plante & Moran, PLLC, asserting claims of accounting malpractice, breach of contract, negligent misrepresentation, breach of fiduciary duty, and estoppel. Defendant provided tax-accounting advice and services to plaintiffs and to their cellular-telephone businesses, including advice regarding how to structure the businesses to reduce plaintiffs' tax liability; the parties' professional relationship ended in 2006. Subsequently, the Internal Revenue Service audited plaintiffs' tax returns and found deficiencies for the tax years 1996 and 1998 through 2001; defendant had prepared plaintiffs tax returns for each of the audited years. Plaintiffs disputed the deficiencies, and the deficiencies were upheld by the United States Tax Court. After that decision, plaintiffs filed this action and appealed the tax court's decision in the United States Court of Appeals for the Sixth Circuit; the Sixth Circuit affirmed the tax deficiencies, and plaintiffs requested an appeals conference. In 2014, defendant moved for summary disposition of the state claims, arguing that the issues were not ripe because there was no final determination of tax liability. The court, George J. Mertz, J., granted the motion. Plaintiffs appealed, and in an unpublished per curiam opinion, issued May 17, 2016 (Docket No. 325884), the Court of Appeals, GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ., reversed and remanded the case for further proceedings. On remand, after additional discovery, the court granted defendant's new motion for summary disposition of plaintiffs' claims brought under MCR 2.116(C)(8) and (10). Plaintiffs again appealed.

The Court of Appeals *held*:

1. Professional malpractice arises from the breach of a duty owed by one rendering professional services to a person who has contracted for such services. A professional-malpractice claim is a tort claim predicated on the failure of the defendant to exercise the requisite professional skill. Generally, accountants are subject to liability for malpractice under the rules of the common law.

In that regard, MCL 600.2912(1) provides that a civil action for malpractice may be maintained against any person professing or holding himself or herself out to be a member of a state-licensed profession and that the rules of the common law applicable to actions against members of a state-licensed profession, for malpractice, are applicable against any person who holds himself or herself out to be a member of a state-licensed profession. In other words, MCL 600.2912(1) acknowledges an action for malpractice against state-licensed professionals, like accountants, under the common law. With regard to an action for professional malpractice against a certified public accountant (CPA), MCL 600.2962(1) provides that a CPA is liable for civil damages in connection with public-accounting services performed by the CPA for a negligent act, omission, decision, or other conduct if the claimant is the CPA's client. MCL 600.2912a in turn imposes on a plaintiff alleging malpractice the burden of establishing the recognized standard of acceptable professional practice or care and of establishing that the defendant failed to meet this standard in providing professional services to the plaintiff; the burden applies to *all* malpractice actions, including those alleging accounting malpractice. Accordingly, while MCL 600.2962 provides limits on a cause of action for accounting malpractice, the statute does not exclusively govern accounting-malpractice actions. That is, MCL 600.2962 does not abrogate a plaintiff's obligation under MCL 600.2912a to establish the standard of care and to establish the defendant's failure to meet that standard. In this case, the trial court correctly determined that plaintiffs had the burden of presenting proof regarding the standard of care and whether defendant had breached that standard.

2. To state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship, (2) negligence in the performance of the duties within that relationship, (3) proximate cause, and (4) the fact and extent of the client's injury. A malpractice claim requires proof of simple negligence based on a breach of a professional standard of care. In that regard, MCL 600.2912a(1)(a) provides that in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice, the defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community and that as a proximate result of the defendant failing to provide that standard of care, the plaintiff suffered an injury. Generally—except when a lack of professional care is so obvious as to be within the common knowledge and experience of

an ordinary layperson—a plaintiff must introduce expert testimony to establish the applicable standard of care and to establish that the professional breached the standard of care. A malpractice claim may be dismissed when a plaintiff fails to present expert testimony regarding the standard of care. Because of the complex accounting issues involved in this case, the trial court did not err by concluding that plaintiffs were required to offer expert testimony to establish the applicable standard of care and to establish that defendant failed to meet that burden. The trial court correctly determined that plaintiffs' expert failed to specify in his report and in his deposition testimony the applicable standard of care and failed to specifically state that defendant breached the standard by recommending the business structure used by plaintiffs that resulted in tax deficiencies. Contrary to the trial court's conclusion, however, the later-filed affidavit of plaintiffs' expert did not contradict the expert's earlier report and deposition testimony. Rather, the affidavit appropriately clarified the expert's opinion that defendant's bad advice resulted in plaintiffs' tax liability, and the trial court erred by not considering the affidavit. Nonetheless, the expert's affidavit failed to identify the relevant standard of care and the manner in which defendant breached that standard. Because plaintiffs failed to establish a question of material fact regarding whether defendant breached the standard of care, the trial court correctly dismissed plaintiffs' accounting-malpractice claim.

3. A plaintiff may allege both breach of contract and malpractice in the same action. A tort claim and contract claim may arise from the same transaction, but the two causes of action are separate, with different theories and different proofs. Although a malpractice claim is a tort grounded in an allegation of failure to exercise the requisite professional skill, when there is a failure to perform a specific contracted-for action, the cause of action may be one of breach of contract. Accordingly, an attorney may be held liable for breach of contract if the attorney breached a special agreement rather than a general agreement to provide requisite skill or adequate legal services; a special agreement is a contract to perform a specific act. A breach-of-contract claim will not be barred simply because the underlying facts may also establish a claim for legal malpractice. In this case, the trial court correctly dismissed plaintiffs' breach-of-contract claim because plaintiffs' malpractice allegations were essentially the same as those supporting their breach-of-contract claim. In other words, defendant's alleged failure to properly conduct the work that plaintiffs hired him to do was not sufficient to establish a breach-of-contract claim separate from the malpractice claim.

4. The trial court correctly dismissed plaintiffs' negligent-misrepresentation, breach-of-fiduciary-duty, and estoppel claims because the gravamen of each claim was duplicative of the malpractice claim.

Affirmed.

EVIDENCE — EXPERT TESTIMONY — ACCOUNTING MALPRACTICE — STANDARD OF CARE — BURDEN OF PROOF.

MCL 600.2912a, which imposes on a plaintiff alleging malpractice the burden of establishing the recognized standard of acceptable professional practice or care and establishing that the defendant failed to meet this standard in providing professional services to the plaintiff, applies to all malpractice actions, including those alleging accounting malpractice; although MCL 600.2962 provides limits on a cause of action for accounting malpractice, the statute does not abrogate a plaintiff's obligation under MCL 600.2912a to establish the standard of care and to establish the defendant's failure to meet that standard.

MahanyLaw (by *Anthony Dietz* and *Brian Mahany*) for plaintiffs.

Miller, Canfield, Paddock and Stone, PLC (by *Michael W. Hartmann* and *James Woolard*) for defendant.

Before: BOONSTRA, P.J., and JANSEN and GADOLA, JJ.

GADOLA, J. Plaintiffs, Robert F. and Kimberly Broz, appeal as of right the order of the trial court granting summary disposition to defendant, Plante & Moran, PLLC, under MCR 2.116(C)(8) and (10). We affirm.

I. FACTS

This case involves alleged accounting malpractice. When this case was previously before this Court in *Broz v Plante & Moran, PLLC*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2016 (Docket No. 325884), we summarized the underlying facts as follows:

Robert Broz operated several businesses that provide cellular telephone services, including RFB Cellular and Alpine PCS. He organized the businesses as S Corporations, which provided for pass through taxation. The IRS audited the [Brozes'] tax returns and issued a notice of deficiency, or 90-day letter, to them. The IRS listed various deficiencies in the [Brozes'] tax payments for tax years 1996, 1998, 1999, 2000, and 2001. Plante Moran prepared the [Brozes'] tax returns for each of those years. The parties' professional relationship ended in February 2006.

After the end of the relationship, but before the IRS issued the notice of deficiency, the [Brozes] filed amended tax returns for years 1998-2001, each one designated as a "protective filing" and showing a decrease in adjusted gross income of $35,675,453. Having claimed a large net operating loss for tax year 2002, they filed the amended returns in hopes of taking advantage of the 2002 enactment of the Job Creation and Worker Assistance Act, PL 107-147, § 102(a); 116 Stat 21, which allowed taxpayers to carry back net operating losses incurred in tax years 2001 and 2002 for five years instead of the normal two.

The [Brozes] then sued the IRS in the United States Tax Court and disputed the deficiencies; they alleged in relevant part that all but a nominal amount of any tax deficiency assessed as a result of the audit would be eliminated by their 2002 net operating loss carryback. Despite raising the 2002 carryback as an issue in their petition to the Tax Court, the [Brozes] chose not to press that matter as part of their case before that tribunal. Their trial lawyer explained at deposition that this was done for strategic reasons and with the knowledge and approval of Robert Broz.

The [Brozes] sued Plante Moran for malpractice in 2008, but the parties entered into a series of tolling agreements pending the resolution of the case in the United States Tax Court. The Tax Court issued a decision in favor of the IRS on the deficiencies on September 1, 2011, *Broz v Comm'r of Internal Revenue*, 137 TC 46 (US Tax Ct, 2011). The [Brozes] then filed this action on January 19, 2012. They also appealed the decision of the

> Tax Court to the United States Court of Appeals for the Sixth Circuit. While that appeal was pending, the [Brozes'] lawyer attempted to fight collection efforts by the IRS by asserting that the judgment could be reduced either by a favorable ruling from the Sixth Circuit, or by application of the [Brozes'] 2002 net operating loss carryback, which they were still pursuing with the IRS. The federal appellate court affirmed the judgment of the Tax Court in August 2013. See *Broz v Comm'r of Internal Revenue*, 727 F3d 621 (CA 6, 2013). On September 16, 2014, the IRS sent the [Brozes] a letter disallowing the [Brozes'] carryback claims. The [Brozes'] lawyer responded with a letter stating their disagreement and requesting an appeals conference.
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> Plante Moran moved for summary disposition of this case on November 5, 2014. It argued that the case must be dismissed because it was not yet ripe; specifically, it stated that the IRS's review process could yet determine that no damages existed. It also argued that, by failing to assert the carryback argument in the United States Tax Court, the [Brozes] caused their own losses. The trial court agreed that the cause of action was not ripe. Although the [Brozes] had been assessed a tax liability, the court explained, they had not suffered any present injury because it was possible that that liability would be offset if they prevailed in their pending action with the IRS. On that basis, the trial court granted Plante Moran's motion for summary disposition under MCR 2.116(C)(4) and dismissed the case without prejudice. [*Broz*, unpub op at 1-2.]

On appeal in this Court, plaintiffs argued that the trial court erred by granting summary disposition to defendant on ripeness grounds. This Court agreed, reversing the decision of the trial court and remanding the case to the trial court for further proceedings. *Id*. at 4.

On remand, the parties engaged in additional discovery, and defendant again sought summary disposition of plaintiffs' amended complaint, which alleged

breach of contract, professional negligence (malpractice), negligent misrepresentation, breach of fiduciary duty, and "estoppel to mitigate and indemnity." The trial court granted defendant's motion, dismissing plaintiffs' claim for professional negligence (malpractice) under MCR 2.116(C)(10) and dismissing all other counts of plaintiffs' complaint under MCR 2.116(C)(8) and (10). Plaintiffs again appeal in this Court.

II. ANALYSIS

Plaintiffs contend that the trial court erred by granting summary disposition of their claims under MCR 2.116(C)(8) and (10). We review de novo a trial court's decision to grant or deny summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). In so doing, we review the entire record to determine whether the moving party was entitled to summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo issues of statutory construction. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

A motion for summary disposition under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, 461 Mich at 119. A motion for summary disposition under this section is properly granted when, considering only the pleadings, the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*. at 119-120. By contrast, when reviewing an order granting summary disposition under MCR 2.116(C)(10), this Court considers all documentary evidence submitted by the parties in the light most

favorable to the nonmoving party. *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 520; 895 NW2d 188 (2016). Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. When a motion is made and supported under MCR 2.116(C)(10), the burden shifts to the nonmoving party to show, by affidavits or other documentary evidence, that there is a genuine issue of material fact. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the nonmoving party does not make such a showing, summary disposition is properly granted. *Quinto*, 451 Mich at 363.

A. PROFESSIONAL NEGLIGENCE (MALPRACTICE)

Plaintiffs first contend that the trial court erred by granting defendant summary disposition under MCR 2.116(C)(10) of plaintiffs' claim of accounting malpractice. We disagree.

1. STANDARD OF CARE

Plaintiffs argue that the trial court erroneously imposed on them a duty to establish the standard of care and whether defendant met that standard of care, which plaintiffs argue is a burden that is not properly imposed on a plaintiff bringing a claim of accounting malpractice. Plaintiffs are incorrect in this assertion.

Professional malpractice arises from the "breach of a duty owed by one rendering professional services to a person who has contracted for such services." *Saur v Probes*, 190 Mich App 636, 638; 476 NW2d 496 (1991). A professional-malpractice claim is a tort claim predicated on the failure of the defendant to exercise the

requisite professional skill. *Stewart v Rudner*, 349 Mich 459, 468; 84 NW2d 816 (1957). Accounting is a profession traditionally subject to common-law malpractice liability. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 333; 535 NW2d 187 (1995).

Members of a state-licensed profession, such as accountants, are subject to liability for malpractice under the rules of the common law as articulated by MCL 600.2912,[1] which provides:

> (1) A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.
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> (2) Malpractice may be given in evidence in defense to any action for services rendered by the member of a state licensed profession, or person holding himself out to be member of a state licensed profession.

Section 2962 of the Revised Judicature Act, MCL 600.2962, sets forth limitations on liability for accounting malpractice. At all times relevant to this action,[2] § 2962 provided:

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[1] Our Supreme Court has explained that the purpose of this statute is to ensure that the impostor and the state-licensed professional are both held to the same standard of care. See *Sam v Balardo*, 411 Mich 405, 425-426; 308 NW2d 142 (1981) ("[L]iability for malpractice of members of state-licensed professions is to be determined by resort to the common law. Accordingly, the provisions of the [Revised Judicature Act, MCL 600.101 *et seq*.] do not purport to create or limit the cause of action of malpractice to something other than what was recognized at common law.").

[2] MCL 600.2962 has since been amended by 2012 PA 268, effective July 3, 2012. The malpractice alleged in this case occurred not later than 2006.

> This section applies to an action for professional malpractice against a certified public accountant. A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant *only in 1 of the following situations*:
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> (a) A negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant's client.
>
> (b) An act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation.
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> (c) A negligent act, omission, decision, or other conduct of the certified public accountant if the certified public accountant was informed in writing by the client at the time of engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. For the purposes of this subdivision, the certified public accountant shall identify in writing to the client each person, generic group, or class description that the certified public accountant intends to have rely on the services. The certified public accountant may be held liable only to each identified person, generic group, or class description. The certified public accountant's written identification shall include each person, generic group, or class description identified by the client as being benefited or influenced. [Emphasis added.]

Generally, to state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship, (2) negligence in the performance of the duties within that relationship, (3) proximate cause, and (4) the fact and extent of the client's injury. See *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995) (defining legal malpractice). This Court has also stated that "[a] malpractice claim requires proof of simple negligence based on a breach of a professional standard of care." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994),

abrogated on other grounds *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004); see also MCL 600.2912a. The standard of care refers to what a professional must or must not do. See *Moning v Alfono*, 400 Mich 425, 437-438; 254 NW2d 759 (1977). In that regard, MCL 600.2912a provides:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
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> (2) In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

The plaintiff is usually required to introduce expert testimony to establish the applicable standard of care and to establish that the professional breached the standard of care, but such testimony is not necessary when the lack of professional care is so obvious as to be within the common knowledge and experience of an

ordinary layman. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). When a plaintiff fails to present expert testimony regarding the standard of care, the malpractice claim is subject to dismissal. See *Locke v Pachtman*, 446 Mich 216, 225-226; 521 NW2d 786 (1994) (discussing medical malpractice).

In this case, the trial court found that plaintiffs had failed to present proof of the standard of care and whether defendant had breached that standard of care. Specifically, the trial court found that plaintiffs' expert, Peter Oettinger, did not directly testify or report regarding the standard of care, and on that basis, the court concluded that defendant was entitled to summary disposition of plaintiffs' claim of accounting malpractice. Plaintiffs argue that the trial court erred by requiring them to present proof of the standard of care, contending that accounting-malpractice claims are governed exclusively by MCL 600.2962, which, plaintiffs argue, does not require a plaintiff alleging accounting malpractice to present proof of the standard of care. Plaintiffs further argue that MCL 600.2912a does not apply to accounting-malpractice claims.

When construing a statute, this Court's primary task is to discern and give effect to the intent of the Legislature. *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017). This Court begins this task by examining the language of the statute as the most reliable evidence of the intent of the Legislature, *id*., giving the language of the statute its plain and ordinary meaning, *TOMRA of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 300; 926 NW2d 259 (2018). If the language is unambiguous, this Court will conclude that the Legislature intended the meaning clearly expressed and will enforce the statute as written. *Coldwater*, 500 Mich at

167, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

MCL 600.2912a(1) does not specifically state that it applies to accounting malpractice. Rather, the statute provides that "in an action alleging malpractice, the plaintiff has the burden of proving" that the defendant "failed to provide the plaintiff the recognized standard of acceptable professional practice or care." *Id*. Giving this language its plain and ordinary meaning, the statute indicates that the Legislature meant it to apply to "an action alleging malpractice" without exception. MCL 600.2912a therefore imposes on plaintiffs, who in this case are alleging malpractice, the burden of establishing the recognized standard of acceptable professional practice or care and of establishing that defendant failed to meet this standard in providing professional services to plaintiffs.[3]

To summarize, MCL 600.2912(1) acknowledges a malpractice cause of action against state-licensed professionals, such as accountants, under the rules of the common law. MCL 600.2962 sets forth limitations on a cause of action for accounting malpractice.[4] MCL 600.2912a articulates the burden on a plaintiff in a malpractice case to demonstrate the standard of care and a breach of that standard by the defendant, which

[3] We note that this Court previously has determined that MCL 600.2912a applies to a claim alleging accounting malpractice, albeit in unpublished opinions, which are not precedentially binding, MCR 7.215(C)(1), but may be considered instructive or persuasive, *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 137; 892 NW2d 33 (2016).

[4] Thus, it is not MCL 600.2962 that is the fountainhead of accounting malpractice, as plaintiffs suggest, but rather MCL 600.2912(1), with its basis in the common law, that provides the foundation for the cause of action, with MCL 600.2962 providing certain limitations. Furthermore, the existence of MCL 600.2962 does not abrogate a plaintiff's obligation under MCL 600.2912a to establish the applicable standard of care and the defendant's obligation to meet that standard.

applies to malpractice actions without exception. We therefore conclude that MCL 600.2912a imposes on plaintiffs in this case the burden of proving that defendant failed to provide plaintiffs with the recognized standard of acceptable professional practice or care, which is consistent with the burden under the common law on a plaintiff alleging malpractice. The trial court therefore did not err by determining that plaintiffs had the burden of presenting proof regarding the standard of care and whether defendant had breached that standard.

The trial court also did not err by concluding that expert testimony was required in this case to meet that burden. As noted, to establish the standard of care in a malpractice action and, further, to establish that the defendant breached that standard of care, the plaintiff is required to introduce expert testimony except when the lack of professional care is so obvious as to be within the common knowledge and experience of an ordinary layman. *Elher*, 499 Mich at 21. In this case, the report of plaintiff's expert details the complex accounting transactions that led the IRS to find that plaintiffs had tax liability, which plaintiffs argue resulted from defendant's actions. The complexity of the accounting issues involved supports the trial court's conclusion that expert testimony was needed to establish both the standard of care and any alleged breach of that standard in this case.

Having concluded that plaintiffs were required to present the opinion of an expert to establish the standard of care and whether defendant breached that standard of care, we consider whether the trial court erred by finding that plaintiffs in this case failed to do so. Oettinger prepared an extensive report detailing the structure of plaintiffs' businesses and how that

structure, established by defendant, resulted in plaintiffs incurring tax obligations. Oettinger's report also discussed how the businesses could have been structured differently to avoid the tax liability imposed on plaintiffs. Oettinger's report, however, does not specify the standard of care, nor does the report specifically state that defendant breached that standard when it recommended the business structures plaintiffs used. Rather, the report suggests that other approaches might have been successful, but it does not conclude that defendant's conduct rose to the level of malpractice. Oettinger was thereafter deposed by defendant and testified that he had applied the standard of care issued by the AICPA (American Institute of Certified Public Accountants) in preparing his report.

In determining whether Oettinger's report and deposition testimony adequately established the standard of care, the trial court looked to our Supreme Court's decision in *Locke*, 446 Mich at 225-226, for guidance. In *Locke*, a case involving alleged medical malpractice, our Supreme Court upheld the trial court's determination that the plaintiff's expert witness had failed to establish a standard of care and that the plaintiff had therefore failed to establish a prima facie case of malpractice. Our Supreme Court stated:

> As the lower courts found, it is indeed questionable whether Dr. Couch's latter testimony on this point was sufficient to establish a standard of care with regard to "incorrect technique." Dr. Couch, while presenting one way in which needles break, never went so far as to relate that discussion to a standard of care. In effect, she never explained what a reasonably prudent surgeon would do, in keeping with the standards of professional practice, that might not have been done by Dr. Pachtman. Accordingly, the jury would have had no standard against which to measure Dr. Pachtman's conduct. This factor, coupled with

> the conflicting nature of Dr. Couch's testimony, leads us to believe that the standard of care was not sufficiently established. [*Id*. at 225.]

In this case, the trial court determined that because plaintiffs' expert had failed to state an opinion regarding the standard of care and whether defendant had breached that standard, plaintiffs had failed to create an issue of fact regarding their claim of malpractice. Relying on *Locke*, the trial court reasoned:

> Mr. Oettinger's report does state what "typically" occurs, arguably setting *some* basis for what other accountants might have done that the Defendant did not. Further, Mr. Oettinger characterizes the Defendant's actions as "highly questionable". However, like the *Locke* case, these statements do not rise to the level of clearly identifying a standard of care. It is true that Mr. Oettinger stated what typically is done in a timing sense of accounting actions, but he failed to specifically identify what is standard practice or whether the actions and advice the Defendant gave actually breached those professional standards. . . . It is clear from Mr. Oettinger's report that because of Defendant's advice the tax returns resulted in expensive deficiencies. According to Mr. Oettinger the business structure was overly complex and could have been more simple. However, pointing to damages resulting from Defendant's advice does not specifically show the Defendant committed malpractice. Advice from attorneys, doctors, and accountants can be unsatisfactory in that it does not produce the desired results, yet still be within the standard of care. Regardless of Mr. Oettinger's lack of specific language detailing negligence or malpractice, his report does not clearly identify what exactly Defendant *should* have done based on accounting standards of care or how the Defendant's advice breached the standard.

We agree that Oettinger's report does not state the standard of care; although he explained what defendant did wrong and suggests what could have been done instead, he did not specifically identify the stan-

dard of care, nor did he specifically state that defendant violated the standard of care. And although Oettinger stated in his deposition that he had applied the standard of care articulated by the AICPA in preparing his report, he did not state what that standard is or whether defendant breached that standard of care.

2. OETTINGER'S AFFIDAVIT

After defendant moved for summary disposition, plaintiffs submitted to the trial court an affidavit entitled "Declaration of Peter Oettinger, CPA," attempting to clarify Oettinger's testimony regarding the standard of care. In the affidavit, Oettinger states, in pertinent part:

> 5. This declaration is made in response to Defendant's suggestion that Defendant has not violated "a duty or standard of care." That statement is false. Defendant has clearly violated their duty to Plaintiffs and did provide bad accounting advice.
>
> 6. The tax planning and tax advice provided by Defendant to the [Brozes] and their companies were wrong. Their bad advice directly resulted in the IRS disallowing millions of dollars of deductions that the [Brozes] took on their personal returns.
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> * * *
>
> 12. To be crystal clear, my report and my testimony is that Defendant committed accounting malpractice and violated its duties to the [Brozes]. Whether or not my report used some particular "buzzword,[1]" the net effect is the same. Plante & Moran clearly and unequivocally violated its duty of care to Robert and Kimberly Broz.

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[1] Notwithstanding Defendant's suggestion to the contrary, my report indicates that I used the standard of care as issued by the AICPA. Subsequent research confirms

> that Michigan has adopted the AICPA standard. (Michigan Department of Licensing and Regulatory Affairs Accountant Rule 338.5102 which states[, "](1) The following standards are adopted by reference: (a) The standards issued by the American Institute of CPAs (AICPA), 220 Leigh Farm Road, Durham, North Carolina, 27707, set forth in the publication 'AICPA Professional Standards'[. . . ."])

The trial court declined to consider the affidavit, finding it a contradiction of Oettinger's earlier testimony. Plaintiffs contend that Oettinger's affidavit was sufficient to clarify his testimony on the standard of care and that the trial court erred by declining to consider the affidavit. "[A] witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). See also *Mitan v Neiman Marcus*, 240 Mich App 679, 683; 613 NW2d 415 (2000) (stating that a party may not contrive a factual issue by asserting the contrary in an affidavit after a deposition). But although a witness is bound by his or her deposition testimony, an affidavit that clarifies or expands on previous testimony is not prohibited from consideration. See *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 312; 600 NW2d 664 (1999).

In this case, the record does not support the trial court's finding that Oettinger's affidavit contradicts his earlier report or deposition testimony. A review of Oettinger's report and deposition testimony demonstrates that the affidavit is consistent with his testimony, and in fact, the trial court noted in its opinion that the affidavit *clarified* Oettinger's position that defendants violated their duty to plaintiffs by provid-

ing bad advice and by structuring the businesses in a manner that resulted in tax liability to plaintiffs. Because an affidavit that clarifies or expands on previous testimony is not prohibited from consideration, see *id*., the trial court was obligated to consider the affidavit. MCR 2.116(G)(5).

We therefore next consider whether the affidavit adequately supplies the missing information regarding the standard of care. In his deposition, Oettinger testified that in writing his report he had applied the standard of care adopted by the AICPA. In his affidavit, he notes that Michigan has adopted the AICPA standards for accountant malpractice and also explicitly states that defendant violated its duty of care to plaintiffs. But Oettinger's affidavit does not explicitly state the standard of care, nor does it identify what actions by defendant breached that standard. It is not enough to say that defendant violated its duty to plaintiffs or provided bad accounting advice because a professional's bad advice, even combined with a bad result, is not necessarily malpractice. Rather, the expert testimony must establish what the professional's duty is by identifying the relevant standard of care and then specifying what the defendant did or failed to do that violated that standard of care. Accordingly, although all documentary evidence must be considered in the light most favorable to plaintiffs as the nonmoving party, *Dawoud*, 317 Mich App at 520, here, plaintiffs failed to establish a question of material fact regarding whether defendant breached the standard of care because they failed to present expert testimony on the standard of care and whether defendant breached that standard. The trial court therefore did not err by granting defendant summary disposition of plaintiffs' claim for accounting malpractice.

B. DISMISSAL OF REMAINING CLAIMS

Plaintiffs next contend that the trial court erred by dismissing plaintiff's remaining claims for breach of contract, negligent misrepresentation, breach of fiduciary duty, and "estoppel to mitigate and indemnity." We disagree.

1. BREACH OF CONTRACT

A plaintiff may allege both breach of contract and malpractice in the same action. See *Stewart*, 349 Mich at 468. A contract obligates the parties to do certain acts or provide certain services, and it encompasses the duty to perform those acts or services with due care. Malpractice can arise from the breach of that duty of care owed under the contract. *Saur*, 190 Mich App at 638; *Malik v William Beaumont Hosp*, 168 Mich App 159, 168; 423 NW2d 920 (1988). But the duty to meet the standard of care is distinct from the contractual duty to provide services and, as a result, a plaintiff can raise both tort and breach-of-contract claims in one action. A tort claim and contract claim thus may arise from the same transaction, but the two causes of action are separate, with different theories and different proofs. *Stewart*, 349 Mich at 468.

In addition, although a malpractice claim is a tort claim grounded in an allegation of failure to exercise the requisite professional skill, when there is a failure to perform a specific contracted-for action, the cause of action may be one of breach of contract. *Id*. In the context of legal malpractice, this Court has concluded that an attorney may be held liable under a contract theory if the attorney breached a "special agreement" rather than a general agreement to provide requisite skill or adequate legal services. *Brownell v Garber*, 199

Mich App 519, 524-525; 503 NW2d 81 (1993). A special agreement is a contract to perform a specific act. *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984). When a plaintiff successfully pleads a nontort cause of action, such as breach of contract, the claim will not be barred simply because the underlying facts may also establish a tort cause of action. *In re Bradley Estate*, 494 Mich 367, 386; 835 NW2d 545 (2013).

In determining whether a claim is based in contract or tort, courts are not bound by the label assigned to the claim by the plaintiff. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229; 859 NW2d 723 (2014). Rather, a court is required to consider the gravamen of the suit based on the complaint as a whole. *Id*., citing *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). Generally, "a tort requires a wrong independent of a contract . . . ." *In re Bradley Estate*, 494 Mich at 383 (quotation marks and citation omitted). "[T]he distinguishing feature of a tort is that it consists in the violation of a right given or neglect of a duty imposed by law, and not by contract." *Id*. (quotation marks, citation, and brackets omitted).

In this case, the trial court correctly noted that a plaintiff may bring a claim for both malpractice and breach of contract in the same action but nonetheless dismissed plaintiffs' breach-of-contract claim, reasoning that the allegations of the complaint asserting malpractice and asserting breach of contract were essentially the same. The trial court reasoned:

> Here, Plaintiffs' complaint is not alleging that the Defendant failed to perform a specific task such as the promise to watch an employee as in *Banker* [*& Brisebois Co v Maddox*, unpublished per curiam opinion of the Court of

> Appeals, issued April 29, 2014 (Docket No. 310993).] As reflected in *Barnard* and *Aldred* [*v O'Hara-Bruce*, 184 Mich App 488; 458 NW2d 671 (1990)], Plaintiffs[y] claim here is in essence an allegation that the Defendant's accounting services were inadequate. Labels aside, Plaintiffs' claim for breach of contract is in substance another way of stating their claims for malpractice. Because the Plaintiffs have failed to plead or establish facts that would support a separate claim for breach of contract, the Defendant is entitled to summary disposition on that claim.

The trial court's conclusion is supported by the record. Plaintiffs assert that defendant breached their contract by failing to adequately render the contracted-for professional services, such as setting up their business structure in a tax-advantageous manner. Although a claim for breach of contract will not be barred simply because the underlying facts also establish a tort cause of action, *In re Bradley Estate*, 494 Mich at 386, defendant's alleged failure to properly conduct the work that plaintiffs hired defendant to do is not sufficient to establish a breach-of-contract claim separate from the malpractice claim. The trial court therefore did not err by granting defendant summary disposition of plaintiffs' breach-of-contract claim.

2. REMAINING CLAIMS

The trial court similarly granted defendant summary disposition under MCR 2.116(C)(8) and (10) of plaintiffs' remaining claims for negligent misrepresentation, breach of fiduciary duty, and "estoppel to mitigate and indemnity." Plaintiffs contend that the trial court erred in doing so because these causes of action differ from malpractice. While it is true that these causes of action differ from malpractice, plaintiffs' allegations are virtually the same for these claims as for their claim of malpractice, and we discuss them here together.

Regarding negligent misrepresentation and breach of fiduciary duty, a professional may be liable for ordinary negligence as well as for malpractice. See *MacDonald v Barbarotto*, 161 Mich App 542, 549; 411 NW2d 747 (1987). However, a claim arising out of the fiduciary relationship between a professional and the professional's client alleging that the professional failed to adequately provide professional services sounds in malpractice, regardless of the label given to the claim. See *Aldred*, 184 Mich App at 490. This Court has held that a claim for breach of fiduciary duty is not necessarily duplicative of a claim for legal malpractice, but "[t]he conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice. Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Prentis Family Foundation, Inc v Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005) (quotation marks and citation omitted).

Regarding plaintiffs' equitable claim entitled "estoppel to mitigate and indemnity," plaintiffs appear to request equitable relief from the trial court, asserting that their damages could have been mitigated if defendant had paid plaintiffs' tax liability when it was assessed against plaintiffs. Again, these allegations have as their basis the contention that defendant poorly performed its professional duties to plaintiffs, causing plaintiffs to incur tax liability.

The trial court dismissed these remaining claims (negligent misrepresentation, breach of fiduciary duty, and estoppel) as redundant, concluding that although these claims had various labels, each claim was essentially the same as the claim of malpractice. We agree.

Viewing these claims within the context of the entire complaint, each of the claims has as its gravamen the same actions that make up defendant's alleged malpractice. In each count of plaintiffs' amended complaint, the action complained of is, essentially, that defendant gave plaintiffs bad advice. Defendant advised plaintiffs that the business structure they were providing for plaintiffs' businesses would result in favorable tax treatment. Defendant was wrong. The IRS disagreed with defendant, resulting in damages and years of litigation for plaintiffs. But because the gravamen of each of these claims is duplicative of the claim for malpractice, the trial court did not err by granting defendant summary disposition of these remaining claims.

Affirmed.

BOONSTRA, P.J., and JANSEN, J., concurred with GADOLA, J.

HOOKER v MOORE

Docket No. 343334. Submitted December 5, 2018, at Lansing. Decided December 11, 2018, at 9:05 a.m. Leave to appeal denied at 504 Mich 852 (2019).

Jeremy Hooker submitted a petition for the recall of Brenda M. Moore to the Secretary of State, alleging that Moore, who had been serving as the drain commissioner for Muskegon County, selected the most expensive options for projects assessed while she was in office when less expensive alternatives had been proposed to her. Moore received a letter from the Bureau of Elections notifying her of her recall and indicating that the Board of State Canvassers (the Board) would conduct a hearing. The Board did not hold the planned hearing, which, pursuant to MCL 168.951a(3), constituted a determination that the reason stated in the petition for Moore's recall met the requirements of MCL 168.951a(1)(c). Moore appealed the determination in the Court of Appeals, arguing that the requirements of MCL 168.951a(1)(c) had not been met.

The Court of Appeals *held*:

Under Const 1963, art 2, § 8, the right to recall an elected official is reserved to the voters. The Legislature enacted MCL 168.951a, which applies to the attempted recall of a county official other than a county commissioner. Under MCL 168.951a(2), a petition for recall must be submitted to the Board before it may be circulated. The Board must then meet to determine whether the reason stated in the recall petition is factual and of sufficient clarity to enable the officer whose recall is being sought and the electors to identify the course of conduct that is the basis for the recall, as required by MCL 168.951a(1)(c). Under MCL 168.951a(3), the Board's failure to meet constitutes a determination that the reasons stated in the recall petition met the requirements of MCL 168.951a(1)(c). Finally, under MCL 168.951a(6), an elected officer whose recall is sought may appeal a determination by the Board in the Court of Appeals for a determination concerning whether the reasons stated in the recall petition are factual and of sufficient clarity. In this case, Moore argued that the ground stated in the petition for her recall was not factual because Hooker misstated her record; Moore

argued that the term "factual" as used in the statute must be understood to require that the petition be truthful. In ordinary usage, the word "factual" can mean "restricted to or based on fact," while the word "fact" can mean "an actual occurrence" and "a piece of information presented as having objective reality." The Legislature included the terms "factual" and "factually" in MCL 168.951a to ensure that the grounds set forth in a recall petition are stated in the form of a factual assertion about the official's conduct that the proponent believes warrants the recall; however, the language of MCL 168.951a does not specify that the reason for the recall stated in the petition must be truthful. An assessment of the accuracy or truthfulness of a factual assertion is an inquiry into the sufficiency of the reason stated in support of recall; our Constitution plainly reserves that assessment to the electors, and the Legislature could not in any event remove that right from them. Therefore, the terms "factually" and "factual" as used in MCL 168.951a require the reason stated in the recall petition to be in the form of a factual assertion but do not confer upon the Board or upon the Court of Appeals the task of determining the truthfulness of the statement. The reason stated for Moore's recall—that she undertook the most expensive options for projects when less expensive alternatives were proposed to her—was a factual assertion. Accordingly, because that statement was factually and clearly stated, the petition met the requirements of MCL 168.951a(1)(c).

Affirmed.

PUBLIC OFFICERS — RECALL PETITIONS — WORDS AND PHRASES — "FACTUAL" AND "FACTUALLY."

MCL 168.951a(1)(c) provides that a petition for the recall of a county official other than a county commissioner must state factually and clearly each reason for the recall; MCL 168.951a(3) requires that the Board of State Canvassers (the Board) meet to determine whether each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall; the terms "factual" and "factually" as used in MCL 168.951a require the reason stated in the recall petition to be in the form of a factual assertion but do not confer upon the Board or upon the Court of Appeals the task of determining the truthfulness of the statement.

Smith Haughey Rice & Roegge (by *Kevin B. Even*) for Jeremy Hooker.

Waters Law Offices, PC (by *James L. Waters*) for Brenda M. Moore, and Brenda M. Moore *in propria persona*.

Before: BOONSTRA, P.J., and JANSEN and GADOLA, JJ.

GADOLA, J. Appellant, Brenda M. Moore, appeals as of right the determination of the Board of State Canvassers (the Board) that the petition for recall submitted by appellee, Jeremy Hooker, complied with the requirements of MCL 168.951a(1)(c). Because we conclude that the petition for recall met the requirements of that statutory section, we affirm.

I. FACTS

Appellant has been serving as the Muskegon County drain commissioner since November 2013. She asserts that in her capacity as drain commissioner she has overseen 18 petitions for drainage projects. According to appellant, with regard to each project she complied with the applicable laws by referring each project to engineers to determine the most cost-effective option, then submitted each project for bids and accepted the lowest bid for each project.

On March 16, 2018, appellee submitted a petition for the recall of appellant to the Secretary of State. The petition stated the following reason for the proposed recall: "Muskegon County Drain Commissioner, Brenda Moore, elected to undertake the broadest scopes of work and most expensive options proposed by her engineers for each project assessed during her current term in office, when less expensive alternatives were proposed to her."

The Department of State, Bureau of Elections, notified appellant of the recall petition by letter, indicating

that the Board would meet to conduct a "Clarity-Factual Hearing" on April 5, 2018. The parties do not dispute that the Board did not hold the planned hearing on April 5, 2018, and that the Board's failure to conduct the hearing constituted "a determination that each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is being sought and the electors to identify the course of conduct that is the basis for the recall." MCL 168.951a(3). Appellant thereafter appealed the determination of the Board in this Court. See MCL 168.951a(6).

II. ANALYSIS

Appellant challenges the Board's determination that the reason stated in the recall petition met the statutory requirements that the reason be factual and of sufficient clarity. MCL 168.951a(1)(c). Initially, we note that an elected officer whose recall is sought may appeal a determination by the Board in this Court for a determination concerning whether the reasons stated in the petition are factual and of sufficient clarity. See MCL 168.951a(6). Resolution of this appeal involves a question of statutory construction, which this Court reviews de novo. *Hastings Mut Ins Co v Grange Ins Co of Mich*, 319 Mich App 579, 583; 903 NW2d 400 (2017).

The right to recall an elected official is reserved to the voters of this state by our state Constitution. See Const 1963, art 2, § 8. In that regard, our Legislature enacted MCL 168.951a, which applies to the attempted recall of a county official other than a county commissioner. See MCL 168.951a(1) and MCL 168.959. At the times relevant to the appeal, MCL 168.951a(1)[1] provided:

[1] MCL 168.951a was amended by 2018 PA 190, effective June 20, 2018.

> (1) A petition for the recall of an officer listed in [MCL 168.959] shall meet all of the following requirements:
>
> (a) Comply with [MCL 168.544c(1) and (2)].
>
> (b) Be printed.
>
> (c) State factually and clearly each reason for the recall. Each reason for the recall shall be based upon the officer's conduct during his or her current term of office. The reason for the recall may be typewritten. If any reason for the recall is based on the officer's conduct in connection with specific legislation, the reason for the recall shall not misrepresent the content of the specific legislation.
>
> (d) Contain a certificate of the circulator. The certificate of the circulator may be printed on the reverse side of the petition.
>
> (e) Be in a form prescribed by the secretary of state.

Before a petition for recall may be circulated, the petition must be submitted to the Board. MCL 168.951a(2). The Board must then meet and "determine . . . whether each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct that is the basis for the recall." MCL 168.951a(3). If the Board determines that "any reason for the recall is not factual or of sufficient clarity," it must reject the entire petition. MCL 168.951a(3).

In this case, the Board did not meet on the date scheduled to consider whether appellee's petition met the statutory criteria. The Board's failure to meet therefore constituted "a determination" by the Board "that each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is being sought and the electors to identify the course of conduct that is the basis for the recall." MCL 168.951a(3). Appellant challenges whether the

petition meets the requirements of MCL 168.951a(1)(c) that the petition "[s]tate factually and clearly each reason for the recall." Specifically, she argues that appellee's stated ground for recall is not factual because he misstates her record and that the term "factual" as used in the statute must be understood to require that the petition be truthful.[2] In response, appellee contends that the reason stated in the recall petition is factually accurate.

We have previously held that Const 1963, art 2, § 8, which reserves to the voters the right to recall an elected official, "was intended to preclude judicial or administrative review of the substantive merit of the reasons alleged in a recall petition" while recognizing the statutory requirement that a recall petition must clearly state the reason for the recall attempt, which is subject to judicial review. *In re Wayne Co Election Comm*, 150 Mich App 427, 437; 388 NW2d 707 (1986). Before the enactment of 2012 PA 417, which added MCL 168.951a and amended MCL 168.952, this Court was tasked with determining the "clarity" of recall petitions, and we noted that our review was limited in scope:

> The standard of review for clarity of recall petitions has been described as both "lenient," and "very lenient." "Thus, recall review by the courts should be very, very

[2] Appellant also asserts, in conclusory fashion and without citation of supporting legal authority, that this Court must interpret MCL 168.951a(1)(c) to require truthful statements because to do otherwise would constitute an unconstitutional taking of her property right to continue in office. It is well settled that political officers have no property rights in their offices. See *Detroit v Div 26 of the Amalgamated Ass'n*, 332 Mich 237, 251; 51 NW2d 228 (1952). It is equally well settled that when a party merely announces his or her position and fails to cite any supporting legal authority, the issue is deemed abandoned. *Southfield Ed Ass'n v Bd of Ed of Southfield Pub Sch*, 320 Mich App 353, 379; 909 NW2d 1 (2017).

> limited." A meticulous and detailed statement of the charges against an officeholder is not required. It is sufficient if an officeholder is apprised of the course of conduct in office that is the basis of the recall drive, so that a defense can be mounted regarding that conduct. "Where the clarity of the reasons stated in the petition is a close question, doubt should be resolved in favor of the individual formulating the petition." [*Dimas v Macomb Co Election Comm*, 248 Mich App 624, 627-628; 639 NW2d 850 (2001) (citations omitted).]

We held, under the version of MCL 168.952 then in effect, that whether the statements in a petition are true is not a proper consideration for rejecting the petition on grounds of clarity because such a determination is a political question that must be left to the electors under Const 1963, art 2, § 8. *Donigan v Oakland Co Election Comm*, 279 Mich App 80, 83-84; 755 NW2d 209 (2008) (discussing MCL 168.952 before the enactment of 2012 PA 417).

Our Legislature has since enacted 2012 PA 417, adding MCL 168.951a, which requires a recall petition to state "factually and clearly each reason for the recall." MCL 168.951a(1)(c). If the Board determines that "any reason for the recall is not factual or of sufficient clarity," it must reject the entire petition. MCL 168.951a(3). Upon appeal in this Court, this Court is charged with determining "whether each reason [stated in the recall petition] is factual and of sufficient clarity . . . ." MCL 168.951a(6). Accordingly, we now consider whether the addition of the terms "factually" and "factual" to the requirement of clarity altered the scope of the determination by this Court to include a determination of "truthfulness."

When construing a statute, our primary task is to discern and give effect to the intent of the Legislature. *Coldwater v Consumers Energy Co*, 500 Mich 158, 167;

895 NW2d 154 (2017). We begin by examining the language of the statute as the most reliable evidence of the intent of the Legislature, and we give the language of the statute its plain and ordinary meaning. *TOMRA of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 299-300; 926 NW2d 259 (2018). If the language is unambiguous, we will conclude that the Legislature intended the meaning clearly expressed and will enforce the statute as written. *Coldwater*, 500 Mich at 167, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

In ordinary usage, the word "factual" can mean "restricted to or based on fact," while the word "fact" can be understood to mean "an actual occurrence" and "a piece of information presented as having objective reality[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). When read in the context of the statute as a whole, the plainest construction is that the Legislature included the terms "factual" and "factually" in MCL 168.951a to ensure that the grounds set forth in a recall petition are stated in terms of a factual occurrence. That is, the ground for recall must be stated in the form of a factual assertion about the official's conduct that the proponent believes warrants the recall. The language of MCL 168.951a does not specify, however, that the reason for the recall stated in the petition must be truthful.

Our state Constitution provides that "[t]he sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question." Const 1963, art 2, § 8. An assessment of the accuracy or truthfulness of a factual assertion is an inquiry into the sufficiency of the reason stated in support of recall; our Constitution plainly reserves that assessment to the electors, and the

Legislature could not in any event remove that right from them. *Donigan*, 279 Mich App at 84, citing *Meyers v Patchkowski*, 216 Mich App 513, 518; 549 NW2d 602 (1996). We therefore conclude that the terms "factually" and "factual" as used in MCL 168.951a require the reason stated in the recall petition to be in the form of a factual assertion but do not confer upon the Board or upon this Court the task of determining the truthfulness of the statement. See Const 1963, art 2, § 8; *Donigan*, 279 Mich App at 84.[3]

In his petition, appellee stated that appellant "elected to undertake the broadest scopes of work and most expensive options proposed by her engineers for each project assessed during her current term in office, when less expensive alternatives were proposed to her." Regardless of whether this is true or false, this is a clearly stated factual assertion. Because the statement is factually and clearly stated, the petition meets the requirements of MCL 168.951a(1)(c). If the petition garners the requisite support, it will be for the electorate to determine whether the assertion is actually true and warrants recall. See *Donigan*, 279 Mich App at 84-85.

Affirmed.

BOONSTRA, P.J., and JANSEN, J., concurrred with GADOLA, J.

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[3] Left as an open question by our ruling in this case is whether the statutory requirement that the stated reason or reasons for recall be "factual" is an unconstitutional limitation on the people's right to recall elected officials. This is a question worth pondering in light of the requirement of Const 1963, art 2, § 8, that the sufficiency of the reasons or grounds stated in a recall petition be a political rather than a judicial question. As appellee fails to raise this issue, we decline to address it.

PEOPLE v WOOD

Docket No. 342424. Submitted September 5, 2018, at Grand Rapids. Decided December 11, 2018, at 9:10 a.m.

Keith E. Wood was convicted following a jury trial in the 77th District Court of jury tampering, MCL 750.120a(1), in connection with his distribution of the pamphlet "Your Jury Rights: True or False?" in front of a courthouse to people entering the building. Defendant attended the pretrial hearing of Andrew Yoder because he was interested in the criminal case even though he did not know Yoder. On the day that the Yoder trial was scheduled to begin, defendant handed out the pamphlet, which asserted that jurors could vote their conscience, that jurors could not be forced to obey a juror oath, and that a juror had the right to hang a jury if he or she did not agree with other jurors. Defendant handed the pamphlet to two women after determining through conversation with the women that they had been summoned to the court for jury selection; the case against Yoder never went to trial that day because Yoder entered into a plea agreement. After being charged in district court with obstruction of justice, MCL 750.505, and jury tampering, defendant moved to dismiss both charges, arguing with regard to the jury-tampering charge that the term "juror" in MCL 750.120a(1) did not include persons who were summoned for jury duty but never selected or sworn. The district court, Kimberly L. Booher, J., dismissed the obstruction charge but denied the motion with regard to jury tampering. After the prosecution rested its case during the subsequent jury trial, defendant again moved to dismiss, arguing that the statute violated his First Amendment right of free speech. The district court denied the motion, reasoning that the state had a compelling interest in ensuring that a fair and impartial jury was chosen, that defendant was interested in the Yoder case, and that he had known the trial was scheduled for that particular day. Defendant appealed his conviction in the Mecosta Circuit Court, arguing that the government violated his First Amendment right of free speech, that MCL 750.120a(1) was unconstitutionally vague, and that he did not receive a fair trial. The circuit court, Eric R. Janes, J., affirmed defendant's conviction. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. MCL 750.120a(1) provides that a person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor. Because the statute only requires that a person attempt to influence "a juror in any case," it is not necessary for the prosecution to prove that an actual trial occurred; there is no indication that the Legislature sought to exclude from prosecution a person who attempts to influence a juror's decision in a case that is ultimately disposed of before trial. In light of dictionary definitions of the term "juror" when the statute was enacted in 1955 as well as more current definitions of the term, the term includes a person summoned for jury duty; the jury-tampering statute is not limited to proscribing conduct directed only at those persons actually seated on a jury. Although the earlier enacted MCL 750.120—which criminalizes the taking of bribes by particular groups of persons—applies to "any person summoned as a juror," comparable language was not necessary in MCL 750.120a(1) because the jury-tampering statute applies only to jurors while the bribery statute applies not only to any person summoned as a juror but also to persons chosen for or appointed to certain identified positions, including trustees and executors. The Legislature used the phrase "any person summoned" in MCL 750.120 to describe the act of being called for jury duty, just as it used a descriptive phrase for the rest of the persons "chosen or appointed" to certain positions. Reading the statutes *in pari materia* because they relate to the common purpose of preserving the integrity and impartiality of juries, both statutes apply to anyone summoned for jury duty. Because the Legislature does not create court rules or jury instructions, use of the term "prospective juror" in certain rules and instructions was not relevant for purposes of determining what the Legislature meant when it used the term "juror" in MCL 750.120a(1). In this case, the district court did not err by refusing to allow defendant to argue that there were no jurors in Yoder's case because no trial occurred. The district court correctly concluded that the MCL 750.120a(1) term "juror" includes persons summoned for jury duty. As a result, the two women outside the courthouse to whom defendant handed pamphlets were jurors for purposes of MCL 750.120a(1), and the statute was correctly applied to defendant's actions.

2. The First Amendment of the United States Constitution provides that Congress shall make no law abridging the freedom

of speech, and the constitutional provision is applicable to the states through the Fourteenth Amendment. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment; speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum. However, the right of free speech is not absolute at all times and under all circumstances. States have the right to punish some speech as long as there is a compelling reason to do so and the limitation is accomplished in the narrowest fashion. Because protecting the sanctity of the jury is a compelling state interest, states may punish or regulate speech intended to interfere with court proceedings or with the right of an accused to have his or her case decided by an impartial jury. An as-applied challenge to a statute alleges that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be validly applied to others. In this case, MCL 750.120a(1) was not unconstitutional as applied to defendant because the jury specifically found that he willfully attempted to influence at least one juror's decision in Yoder's case; the specific level of intent elevated the facts of the case out of the general pamphletting activities protected by the First Amendment. Further, applying the statute to defendant's conduct was a narrowly tailored means of furthering the state's interest in preserving the impartiality and integrity of jurors.

3. For a statute to be facially invalid on overbreadth grounds, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. MCL 750.120a(1) is not constitutionally overbroad because it requires a person to possess the willful intent to influence the decision of a juror in a particular case; the intent requirement acts as a constitutional safeguard because innocent conversations with jurors will rarely constitute jury tampering.

4. A penal statute may be unconstitutionally vague under the Due Process Clause of the United States Constitution if it fails to provide fair notice of the conduct proscribed, permits arbitrary and discriminatory enforcement, or is overbroad and impinges on First Amendment freedoms. A statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited to afford proper notice of the conduct proscribed. For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words. MCL 750.120a(1) is sufficiently definite because the

definition of "juror" is readily ascertainable to anyone with access to a dictionary. In this case, defendant failed to demonstrate that MCL 750.120a(1) is unconstitutional.

5. Even if the district court erred by precluding defendant from cross-examining a witness regarding bias, the error was harmless because the witness only provided context for the events of the day when defendant was arrested, the testimony was cumulative, and there was no evidence that the jury would have reached a different result had it concluded the witness was biased. Accordingly, defendant was not denied a fair trial when the trial court precluded such cross-examination.

Affirmed.

MURPHY, J., dissenting, disagreed with the majority's conclusion that MCL 750.120a(1) was implicated under the facts of this case. It was unnecessary to resort to dictionary definitions of the term "juror" because, in context, the statute proscribes the use of argument or persuasion to willfully attempt to influence the decision of a juror in any case, which implies that the juror has been selected for the jury panel. Consequently, a person is not a "juror" for purposes of MCL 750.120a(1) at the point in time that he or she has been merely summoned for jury duty and arrives at the courthouse. Giving meaning to the words in MCL 750.120a(1) such that none of the words are surplusage and reading the words in the context of the whole statute, the Legislature intended the statute to be implicated only after the trial process has commenced. Accordingly, at the very earliest, one who has been selected as a venireperson may be a juror for purposes of the statute. The Legislature would have used comparable language in MCL 750.120a(1) that it used in MCL 750.120—that is, the phrase "summoned as a juror" instead of just "juror"—if it intended for MCL 750.120a to apply to all persons summoned as a juror. Judge MURPHY would have reversed defendant's conviction.

1. CRIMINAL LAW — JURY-TAMPERING STATUTE — WORDS AND PHRASES — DEFINITION OF "JUROR."

Under MCL 750.120a(1), a person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor; the term "juror" includes a person summoned for jury duty; the jury-tampering statute is not limited to proscribing conduct directed only at those persons actually seated on a jury.

2. CONSTITUTIONAL LAW — OVERBREADTH DOCTRINE — JURY-TAMPERING STATUTE.

MCL 750.120a(1) provides that a person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor; MCL 750.120a(1) is not constitutionally overbroad because it requires that a person possess the willful intent to influence the decision of a juror in a particular case; the intent requirement acts as a constitutional safeguard because innocent conversations with jurors will rarely constitute jury tampering (US Const, Ams I and XIV).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Brian E. Thiede*, Prosecuting Attorney, for the people.

Kallman Legal Group, PLLC (by *David A. Kallman* and *Stephen P. Kallman*) for defendant.

Amici Curiae:

G. S. Hans, *Daniel S. Korobkin*, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan.

Revision Legal, PLLC (by *Eric Misterovich* and *John Di Giacomo*) for the Fully Informed Jury Association.

Revision Legal, PLLC (by *Eric Misterovich*) for the *Cato Institute*.

Before: MURRAY, C.J., and MURPHY and CAMERON, JJ.

MURRAY, C.J. Defendant was convicted of jury tampering, MCL 750.120a(1), a misdemeanor, for attempting to influence jurors when he stood in front of a courthouse and distributed pamphlets to those he knew to be potential jurors in a case set for trial that day. The circuit court affirmed his conviction, rejecting

defendant's statutory and First Amendment arguments. We granted leave to appeal,[1] and we now affirm.

I. FACTS AND PROCEDURAL HISTORY

This matter arose out of defendant's interest in a criminal case involving Andrew Yoder, who had been charged with "a [Department of Environmental Quality] violation" for "illegally draining wetlands." After hearing of the case, defendant decided to attend the pretrial hearing on November 4, 2015, because despite not actually knowing Yoder, the case "piqu[ed] [his] interest." At the pretrial hearing, the court scheduled Yoder's trial for November 24, 2015.

Defendant returned to the courthouse on the day set for trial and stood outside the front entrance to pass out pamphlets entitled, "Your Jury Rights: True or False?" that he had obtained from the Fully Informed Jury Association (FIJA) website. The pamphlet explains that jurors may vote according to their conscience. It further advises readers to be aware "when it's your turn to serve" that "[y]ou may, and should, vote your conscience," that "[y]ou cannot be forced to obey a 'juror's oath,' " and that "[y]ou have the right to 'hang' the jury with your vote if you cannot agree with other jurors!"

Although defendant handed or attempted to hand the pamphlet to a number of people that day, his charge for jury tampering resulted from his distribution of the pamphlet to Jennifer Johnson and Theresa DeVries, two people summoned to the court for jury selection. Johnson testified that she arrived at the courthouse unsure of where to go and that she approached defendant, thinking he was out front to "direct traffic."

[1] *People v Wood*, unpublished order of the Court of Appeals, entered February 22, 2018 (Docket No. 342424).

Although she could not remember who broached the subject, it was established between them that she was there for jury duty. Defendant proceeded to hand her a pamphlet "and sort of pointed at the door." DeVries, on the other hand, testified that as she approached the courthouse, defendant specifically asked if she was there for jury selection. When she confirmed that she was, he handed her a pamphlet and said, " 'Do you know what your rights are for being a jury [sic] on jury duty?' "

Defendant was ultimately arrested and charged with obstruction of justice, MCL 750.505, and jury tampering. Yoder's case, however, never went to trial because the parties reached a plea agreement.

Before trial in his own case, defendant moved the district court to dismiss both charges. The district court granted the motion with respect to obstruction of justice but declined to dismiss the jury-tampering charge. In so doing, the court rejected defendant's argument that the charge should be dismissed because the term "juror," as used in MCL 750.120a(1), does not encompass individuals like Thompson and DeVries who were summoned for jury duty, but who were never actually selected or sworn, and took defendant's First Amendment argument under advisement. The circuit court affirmed the district court's decision, and defendant was denied leave to appeal by this Court, *People v Wood*, unpublished order of the Court of Appeals, entered December 2, 2016 (Docket No. 334410), as well as by the Michigan Supreme Court, *People v Wood*, 500 Mich 963 (2017).

Defendant's two-day jury trial was held in district court. When asked why he had decided to distribute the pamphlets, defendant testified that he

> learned a really interesting fact that 95 percent of all criminal cases in the United States, they are pled out before they go to trial. And so there was a—there was a

> very high likelihood that the *Yoder* case was not going to go to trial, but then I also believed that there were going to be a lot of people around the courthouse and it was going to give me a really good opportunity to educate as many people to hand out the pamphlets and get this information to their hands.

He further stated that he did not know "who was summoned as a potential juror" and that he just handed the pamphlet "[t]o anybody that would receive one."

After the prosecution rested, defendant renewed his motion to dismiss on First Amendment grounds, but the district court rejected the argument, reasoning that defendant "was targeting jurors that were coming in that day" and that there was "a compelling interest in making sure for both the Prosecutor and the defense that there is a fair and impartial jury being chosen and that it is also very clear to me that [defendant] was very interested in that case and knew that the case was set for trial that day." Further, the court found it to be irrelevant that a trial never occurred in Yoder's case.

At the close of trial, the district court provided the following instructions to the jury regarding the elements of jury tampering:

> First, that Jennifer Johnson and/or Theresa DeVries was a juror/were jurors in the case of *People v. Yoder*.
>
> Second, that the defendant willfully attempted to influence that juror by the use of argument or persuasion.
>
> Third, that the defendant's conduct took place outside of proceedings in open court in the trial of the case.
>
> A person acts willfully when he or she acts knowingly and purposefully.
>
> The word "juror" includes a person who has been summoned to appear in court to decide the facts in a specific trial.
>
> An "argument or persuasion" can be oral or written.

Defendant was ultimately convicted and then sentenced on July 21, 2017.

On appeal in the circuit court, defendant argued that: (1) "the State" violated his First Amendment rights when he was "arrested and charged because of the content his pamphlet contained," and such conduct would fail a strict-scrutiny analysis, (2) he was denied his right to due process because MCL 750.120a(1) is unconstitutionally vague, (3) the district court erred by defining the term "juror" to include persons summoned for jury duty, and (4) even if the district court's interpretation was correct, he should not have been convicted under MCL 750.120a(1) because Yoder's case never proceeded to trial.

The circuit court issued its opinion and order on February 2, 2018, affirming defendant's conviction. In so doing, the court first rejected defendant's First Amendment argument, reasoning that the content of the pamphlet was not at issue because "[t]he statute relates solely to when a person attempts to 'influence' a juror's decision, not to 'influence' them as to any topic whatsoever," and defendant willfully attempted to influence people he believed to be jurors. Secondly, the court concluded that because *Black's Law Dictionary* (10th ed) defines "juror" to include those selected for jury duty, the juror-tampering statute applied. And lastly, the court ruled that no evidence existed to support defendant's argument that he was denied a fair trial.

II. DID DEFENDANT TAMPER WITH A "JUROR"?

Defendant first argues that both trial courts erroneously defined "juror," as used in MCL 750.120a(1), to include those summoned for jury duty. Specifically, he asserts that he could not have tampered with "a juror

in any case" under MCL 750.120a(1), because the term "juror" only encompasses those selected and sworn for jury duty, and no jurors were ever selected in Yoder's case.

Statutory interpretation is a question of law reviewed de novo. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). When interpreting statutory provisions, the overriding goal is to discern and give effect to the Legislature's intent. *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2010). The words in the statute are, of course, the best evidence of what was intended by the Legislature in passing the statute. *People v Smith*, 496 Mich 133, 138; 852 NW2d 127 (2014) ("The words of a statute are the most reliable indicator of the Legislature's intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute."). "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible." *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012).

MCL 750.120a(1) provides:

> A person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

The term "juror" is not defined in the statute itself or in the Michigan Penal Code, MCL 750.1 *et seq*. As a result, we may consult a lay dictionary to determine the plain and ordinary meaning of "juror" if the term lacks "a unique legal meaning," *People v Thompson*,

477 Mich 146, 151-152; 730 NW2d 708 (2007), or a legal dictionary if the word is a legal term of art, *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002). See also MCL 8.3a. However, because the definitions of the term "juror" "are the same in both a lay dictionary and legal dictionary, it is unnecessary to determine whether the phrase is a term of art, and it does not matter to which type of dictionary this Court resorts." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016).

Defendant maintains that the rules of statutory construction require a court to consult dictionaries in publication at the time a statute was enacted—1955[2] in this case—to determine the meaning of an undefined term. The Michigan Supreme Court has recognized the importance of defining a statutory term according to its original meaning. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005) (reasoning that because the statute at issue did not define the term "loss," the Court was required to "ascertain the original meaning the word 'loss' had when the statute was enacted in 1912"). See also *Perrin v United States*, 444 US 37, 42; 100 S Ct 311; 62 L Ed 2d 199 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). The definition of "juror" found in both lay and legal dictionaries in publication at the time the statute was enacted supports the trial courts' determination that the term, as used in MCL 750.120a(1), includes those summoned for jury duty, even if never selected nor sworn to serve on a jury.

In deciding defendant's pretrial motion to dismiss, the district court relied in part on *Black's Law*

[2] See 1955 PA 88.

Dictionary (Revised 4th ed), published in 1968, which defines "juror" as "[o]ne member of a jury," and includes a usage note which states, "The term is not inflexible, and besides a person who has been accepted and sworn to try a cause 'juror' may also mean a person selected for jury service." The same definition and usage note appears in *Black's Law Dictionary* (Deluxe 4th ed), published in 1951 and cited by defendant in support of his argument. Moreover, the usage note is consistent with the definition of "juror" in a lay dictionary from 1955. *Webster's New International Dictionary* (1955) provides that a juror is

> [o]ne of a number of men sworn to deliver a verdict as a body; specif., *Law*, a member of a jury, or one designated and summoned to serve on a jury.
>
> "*Juror*" is uniformly used by the jurists most familiar with the subject as including persons designated or ordered to be summoned as *jurors*. For stronger reasons, it would include them after they are summoned and have appeared in court.

Similar definitions for "juror" also appear in more current legal and lay dictionaries. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "juror" as both "a member of a jury" and "a person summoned to serve on a jury[.]" And in *Random House Webster's College Dictionary* (2001), "juror" is defined as "a member of a jury," "a member of the panel from which a jury is selected," or "a person who has taken an oath or sworn allegiance." Similarly, *Black's Law Dictionary* (10th ed) states that a "juror" is "[a] member of a jury; a person serving on a jury panel." The definition of "jury panel" directs the reader to "VENIRE," which is defined as "[a] panel of persons selected for jury duty and from among whom the jurors are to be chosen." *Id*. Consequently, given the dictionary definitions from 1955 and

today, a "juror" under MCL 750.120a(1) includes a person summoned for jury duty.

Defendant's assertions that MCL 750.120, M Crim JI 1.1, and MCR 6.412(B) support his argument regarding the definition of "juror" also fail. MCL 750.120,[3] which punishes jurors who accept bribes, provides as follows:

> Any person summoned as a juror or chosen or appointed as an appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator or referee who shall corruptly take anything to give his verdict, award, or report, or who shall corruptly receive any gift or gratuity whatever, from a party to any suit, cause, or proceeding, for the trial or decision of which such juror shall have been summoned, or for the hearing or determination of which such appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator, or referee shall have been chosen or appointed, shall be guilty of a felony.

Defendant highlights the language "[a]ny person summoned as a juror" to assert that "[i]f the legislature truly intended for jury tampering to include every person who has been summoned, it would have used the same language from the immediately preceding statute." But "the specific rules of statutory construction are merely aids to interpretation." *People v Armstrong*, 212 Mich App 121, 128; 536 NW2d 789 (1995). Looking at MCL 750.120 in its entirety, and considering the context in which the phrase is used, it is obvious to us that the Legislature simply used the phrase "[a]ny person summoned" to describe the act of being called for jury duty, just as it used a descriptive phrase for the rest of the positions listed in the statute, i.e., "[a]ny person . . . chosen or appointed as[.]" No comparable language was necessary or appropriate in

[3] MCL 750.120 was enacted in 1931. 1931 PA 328.

MCL 750.120a(1), as it applies only to jurors. Further, statutory language should be read in harmony with the entire legislative scheme, *York Charter Twp v Miller*, 322 Mich App 648, 662; 915 NW2d 373 (2018), and under the doctrine of *in pari materia*, "statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law," *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). Both MCL 750.120 and MCL 750.120a aim to preserve the integrity and impartiality of juries. It would be inconsistent with this shared purpose to read one as applicable to anyone summoned for jury duty and the other as applicable only to those chosen from the pool of summoned jurors and sworn to serve on a jury.

We likewise reject defendant's position that MCR 6.412(B) and M Crim JI 1.1 support his argument because they each use the term "prospective jurors" with regard to preliminary instructions given before the jury-selection process. Neither the court rules nor jury instructions are created by the Legislature, so their use of the term "prospective jurors" has no bearing on what the Legislature meant when it used the term "juror" in a statute.[4]

Additionally, neither *People v Cain*, 498 Mich 108; 869 NW2d 829 (2015), nor *Jochen v Saginaw Co*, 363

[4] MCL 600.1334 and MCL 600.1344, which govern juror excusal from attendance in court and juror compensation, support our conclusion that the term "juror," as used in MCL 750.120a(1), includes those summoned for jury duty, but never selected to actually serve on a jury. Both use the term broadly. For instance, MCL 600.1334(1) states, in part, "The chief judge may postpone the service of a juror to a later term of court if the juror has not been called for voir dire examination in any action." And MCL 600.1344 provides that jurors must be compensated for each day of actual attendance at sessions of the court. Although "juror" is undefined, the statutes clearly apply to those persons summoned for jury duty but not necessarily selected and sworn.

Mich 648; 110 NW2d 780 (1961), supports defendant's argument. Neither case interpreted the term "juror," as used in MCL 750.120a(1), and we fail to understand how opinions involving the correct juror's oath, see *Cain*, 498 Mich at 112, or whether a person injured while reporting for jury duty should be considered a county employee under the workmen's compensation act, see *Jochen*, 363 Mich at 649, are at all applicable to the separate statutory question before us.

Defendant also argues that the district court misapplied the elements of jury tampering,[5] citing § 2:22(1) of the Michigan Nonstandard Jury Instructions Criminal (August 2016 Update) which recommend the following instruction for the first element of the crime: "*That* [*name juror involved*] *was a juror in the case of* [*name case in which juror sat*][.]" He asserts that "[e]ven the proposed jury instruction acknowledged that the juror must have 'sat' in the case." But this is simply a different way of arguing that the term "juror" does not include those summoned for jury duty, which we have rejected. As stated above, jury instructions are not created by the Legislature, and they therefore have no bearing on the interpretation of statutory terms.

Further, the district court did not err by refusing to allow defendant to argue that there were no jurors in Yoder's case because no trial ever occurred. MCL 750.120a(1) only requires that someone attempt to influence "a juror in any case." A trial is not required,[6]

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[5] "This Court reviews jury instructions as a whole to determine whether there is error requiring reversal." *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

[6] Our dissenting colleague opines that MCL 750.120a(1) is only implicated "after the trial process has commenced." But the language referring to a trial is in the exception to the rule, allowing arguments and persuasion of jurors once trial has commenced. That language adds nothing to when a person becomes a juror under this statute.

and there is no indication that the Legislature sought to exclude from prosecution under MCL 750.120a(1) a person who attempts to influence a juror's decision in a case that is ultimately disposed of before trial.

III. DID DEFENDANT'S CONVICTION VIOLATE THE FIRST AMENDMENT?

A. AS-APPLIED CHALLENGE

Having concluded that Johnson and DeVries were "jurors" for purposes of the jury-tampering statute, we now must address defendant's alternative argument that MCL 750.120a(1), as applied to his circumstances, violated his First Amendment right to free speech.

We review constitutional questions de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000). "A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). "When faced with a claim that application of a statute renders it unconstitutional, the Court must analyze the statute 'as applied' to the particular case." *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000). In other words, "[a]n as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v Menlo Park*, 146 F3d 629, 635 (CA 9, 1998). See also *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) ("An as-applied challenge, to be distinguished from a facial challenge, alleges 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action.") (citation omitted).

The First Amendment of the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech," US Const, Am I, and the amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment, *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 681; 662 NW2d 804 (2003). "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Schenck v Pro-Choice Network of Western New York*, 519 US 357, 377; 117 S Ct 855; 137 L Ed 2d 1 (1997).

Defendant's as-applied challenge is based upon his assertion that his conduct involved pure speech, the restriction of which should be subject to strict scrutiny, and that the state has no compelling interest in preventing a person from distributing educational pamphlets to potential jurors in a public space. In addressing this as-applied challenge, our focus is exclusively on the specific facts at issue—namely, the jury's finding that defendant distributed pamphlets at the courthouse to influence the decision of people he knew to be potential jurors for a case in which he had taken an interest.[7] In fact, as discussed below, the conduct defendant engaged in is precisely the type of speech states have a compelling interest in regulating through validly enacted statutes.

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[7] Evidence at trial supported the jury's findings. Defendant testified that he took an interest in Yoder's case, and he attended the pretrial hearing when the trial date was announced. He then returned to the courthouse on the day set for trial and distributed the FIJA pamphlets to several people, including Johnson and DeVries, who both testified that defendant knew they were at the courthouse because they had been summoned for jury duty.

"[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v New Hampshire*, 315 US 568, 571; 62 S Ct 766; 86 L Ed 1031 (1942). Although speech is given great protections by the First Amendment, the states nonetheless have the right to punish certain limited speech so long as there is a compelling reason to do so and the limitation is accomplished in the narrowest fashion. See *Speet v Schuette*, 726 F3d 867, 880 (CA 6, 2013). And, when it comes to the prevention of jury tampering, it has long been held that states may punish or regulate speech *intended to interfere* with court proceedings or with the right of an accused to have his case decided by an impartial jury. See *Turney v State*, 936 P2d 533, 541 (Alas, 1997) (holding that a narrowly drawn jury-tampering statute did not implicate protected speech under the First Amendment); *Dawkins v State*, 208 So 2d 119, 122 (Fla App, 1968) ("Efforts to influence a grand jury in its deliberations respecting specific matters under investigation by it are not shielded by the constitutional right of free speech."); *Pennekamp v Florida*, 328 US 331, 366; 66 S Ct 1029; 90 L Ed 1295 (1946) (Frankfurter, J., concurring) ("In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries."). See also *Cox v Louisiana*, 379 US 559, 562-564; 85 S Ct 476; 13 L Ed 2d 487 (1965) (upholding a statute that prohibited picketing near a courthouse on the basis that "[a] State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence," and that a statute like that at issue did not infringe the right of free speech because "[t]he conduct which is the subject of [the] statute . . . is subject to regulation even though intertwined with expression and association"). Thus, be-

cause defendant concedes that MCL 750.120a(1) is facially valid and a jury found that he *willfully attempted to influence a juror's decision* in Yoder's case, his as-applied constitutional challenge necessarily fails.[8]

The foregoing is a more direct way of stating that when applying strict scrutiny to the government's actions as defendant urges us to do (and argues the trial courts erred by failing to do), his First Amendment challenge fails because the state has a compelling interest in protecting the sanctity of the jury.[9] "The

[8] The Ninth Circuit rejected a First Amendment challenge to a similar jury-tampering statute in *Turney v Pugh*, 400 F3d 1197 (CA 9, 2005). There, the petitioner (who was also the petitioner in *Turney*, 936 P2d 533) challenged the Alaska statute as overbroad, and as part of its decision, the court reasoned:

> [T]he First Amendment, while generally quite protective of speech concerning judicial proceedings, does not shield the narrow but significant category of communications to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome of a particular case. What Alaska's jury tampering statute covers in the main, then, is speech that is not protected by the First Amendment. [*Turney*, 400 F3d at 1203.]

Defendant's attempt to distinguish *Turney* on the basis that the Alaska statute expressly defined "juror" to include those summoned for jury duty is misguided because the term "juror," as used in MCL 750.120a(1), also includes those summoned for jury duty.

[9] Defendant does not argue that MCL 750.120a(1) is, on its face, a content-based regulation. Rather, he maintains that the government regulated his "speech in a content-based way" given that "[i]t is clear that the government actors in this case arrested and charged [him] because of the content of his pamphlet." We apply strict scrutiny here because although the statute is not a purely content-based restriction, to convict under the statute it must be proved that defendant intended to influence a juror, and that can only be done by reviewing the words communicated to the juror. For example, if defendant were passing out to jurors a newspaper circular with commercial advertisements, he would not have been prosecuted for or convicted of jury tampering.

First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v IMS Health Inc*, 564 US 552, 566; 131 S Ct 2653; 180 L Ed 2d 544 (2011) (quotation marks and citation omitted). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v Town of Gilbert, Arizona*, 576 US ___, ___; 135 S Ct 2218, 2227; 192 L Ed 2d 236 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*. at ___; 135 S Ct at 2226.

Applying strict scrutiny, we hold that application of the statute to defendant's conduct was a narrowly tailored means of furthering the state's compelling interest in preserving the impartiality and integrity of jurors. Defendant concedes that the government has a compelling interest in preventing jury tampering but states that he "does not concede . . . that the State has a compelling interest to criminalize [his] distribution of a juror rights pamphlet on a public sidewalk." Yet this argument is based on the premise, rejected outright by the jury, that defendant only intended to educate the general public with his pamphlet. The jury, in fact, determined the opposite, as it found that defendant had distributed the pamphlets in an attempt to willfully influence the decision of jurors in a particular case. We cannot overemphasize the importance of the jury's finding that defendant intended to influence two jurors summoned for Yoder's case. It is that specific level of intent that takes defendant's case out of the general pamphletting activities protected by the First Amendment.

Further, we reject defendant's argument that the government does not have a compelling interest in preventing tampering with "*potential jurors*." First, as we have already concluded, Johnson and DeVries were "jurors" for purposes of MCL 750.120a(1), not "potential jurors." Second, there is no basis in the law that would allow us to recognize the government's interest in protecting the impartiality of jurors only after they have been selected and sworn, as juries are chosen from the pool of people summoned for jury duty. Jurors summoned for duty that are tampered with do not lose that taint if they end up on the jury. See *State v Tucker*, 170 So 3d 394, 406; 49,822-KA and 49,950-KA (La App 2d Cir, 7/8/15) ("Because any threat or attempt to influence a person summoned for jury duty (i.e., a 'prospective juror') in a pending trial impairs the administration of justice in exactly the same way that justice is impaired by a threat or influence of an impaneled 'juror,' we conclude that the term 'juror' in the statute includes a 'prospective juror' within its reach.").

Defendant's additional argument that "[e]ven if the government had a compelling interest in ensuring *potential jurors* are not informed of the powers they rightfully and lawfully possess . . . , the government failed to use the least restrictive means available to accomplish that interest," fares no better. A content-based restriction on speech "must be the least restrictive means of achieving a compelling state interest." *McCullen v Coakley*, 573 US ___, ___; 134 S Ct 2518, 2530; 189 L Ed 2d 502 (2014). Defendant asserts specifically that the government exercised the most extreme option available in response to his conduct by arresting and prosecuting him and that the government could have instead employed valid time, place, and manner restrictions to regulate his distribution of pamphlets.

We reject this argument for two reasons. First, the argument is based entirely on the rejected premise that defendant's distribution of the pamphlet was an attempt to educate the public rather than a willful attempt to influence the decision of jurors in Yoder's case. Second, although at the time defendant was arrested and charged it appears that certain government actors did not know of defendant's interest in the Yoder case and disapproved of the pamphlet's contents, the jury ultimately found defendant guilty of violating MCL 750.120a(1), which requires a specific intent to influence jurors. And the evidence presented at trial supported these findings. The law defendant was convicted under does not address the random distribution of pamphlets to the general public outside a courthouse. Instead, the Legislature was concerned with an individual's purposeful attempt to tamper with jurors, which is a compelling state interest. The statute also touches upon only a narrowly defined class of people and speech, i.e., those who purposefully communicate with specific jurors summoned to serve on a case with the intent to influence the decision of a juror. Defendant cannot rely on less restrictive means relating to an entirely hypothetical governmental interest not present in this case, and the government clearly has no obligation, through statute, regulation, or rule, to designate places and times during which an individual may engage in criminal behavior, speech-related or not.[10]

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[10] Defendant appears to misunderstand the concept of time, place, and manner restrictions. Time, place, and manner restrictions may be used to regulate speech *otherwise protected under the First Amendment*, if such restrictions are content-neutral and narrowly tailored to serve a significant governmental interest. *Clark v Community for Creative Non-Violence*, 468 US 288, 293; 104 S Ct 3065; 82 L Ed 2d 221 (1984).

B. OVERBREADTH CHALLENGE

Defendant also argues that MCL 750.120a(1) is unconstitutionally overbroad because "[w]hen the lower courts redefined the word 'juror' to mean more than a person actually selected, empaneled, and sworn in a case, it vastly expanded the range and scope of the jury-tampering statute to reach a substantial amount of constitutionally protected speech." Although defendant characterizes his argument as an as-applied challenge, it is more appropriately considered a facial challenge to the statute itself, given that we have held that the lower courts accurately interpreted the term "juror" in MCL 750.120a(1).

"An overbroad statute prohibits protected conduct, primarily conduct protected by the First Amendment." *People v Lueth*, 253 Mich App 670, 676; 660 NW2d 322 (2002). "Under the doctrine of First Amendment overbreadth, a litigant may mount a facial attack on a statute that restricts protected speech even if the litigant's own speech is unprotected." *Turney*, 400 F3d at 1200, citing *Broadrick v Oklahoma*, 413 US 601, 612; 93 S Ct 2908; 37 L Ed 2d 830 (1973). "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 494; 102 S Ct 1186; 71 L Ed 2d 362 (1982). "Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston, Texas v Hill*, 482 US 451, 459; 107 S Ct 2502; 96 L Ed 2d 398 (1987) (citation omitted).

Defendant asserts that the statute is unconstitutionally overbroad because "a person could be criminally liable for merely speaking with, giving information to, or communicating in any way with a potential juror." For example, he contends, if he "had started handing out pamphlets to the summoned potential jurors *after* the Court released them on the day in question, under the lower courts' redefinition, he could still be charged with jury tampering because they were still summoned for that month." However, defendant's assertions ignore the requirement in MCL 750.120a(1) that to be convicted of jury tampering, a person must possess the willful intent to influence the decision of a juror in a particular case. That requirement serves as a constitutional safeguard. As the Ninth Circuit reasoned in *Turney*, 400 F3d at 1204, "innocent" conversations with jurors will rarely violate a jury-tampering statute because such communications will usually lack "the requisite intent." If a person is not attempting to influence a juror's decision in a case, that person can freely communicate with the juror without violating MCL 750.120a(1).

In its amicus brief, the American Civil Liberties Union contends that "[t]he state's interpretation of the jury tampering statute criminalizes a great variety of First Amendment protected expression" and provides the following hypotheticals:

> Consider whether a citizen committed to decriminalizing possession of controlled substances, passing out material regarding the issue outside a courthouse, would be charged with jury tampering if a prospective juror received the material. Would a group advocating for tort reform be prevented from protesting outside the court on days when products liability cases were being tried? Can the court prevent a women's rights organization from holding a rally when sex discrimination cases are on the docket?

Similarly, in its amicus brief, the Cato Institute posed hypotheticals involving op-ed writers, radio personalities, protesters with signs urging conviction, and a wife reminding her husband who has been selected for jury duty that he should not assume government witnesses are more credible than other witnesses.

Despite these concerns, the simple fact is that the conduct prosecuted in this case has no relationship to the eye-grabbing hypotheticals posed, all of which ignore the intent element of MCL 750.120a(1). For instance, an op-ed writer or radio personality expressing an opinion about a particular case or types of cases would likely not possess the intent necessary to be convicted of jury tampering under MCL 750.120a(1). There is a significant distinction between an individual targeting jurors for a particular case and providing them with information calculated to influence how they conduct their duties as jurors, and an op-ed writer or protester who opines about the general propriety of a prosecution or civil matter, with no intent to influence a particular juror. Moreover, "[t]he overbreadth doctrine is not . . . 'casually employed,' even in a case involving a First Amendment challenge." *In re Chmura*, 461 Mich 517, 531; 608 NW2d 31 (2000) (citation omitted). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). There is nothing to show that the statute would be applied to anyone or any set of facts that go beyond the intent required by the statute.

With regard to the political-demonstration examples, the United States Supreme Court's decision in

Cox, provides guidance. In that case, the defendant led a group of people outside a courthouse in protest against the arrest of students the day before, and the defendant was arrested and convicted of intending to influence a juror or to obstruct or impede the administration of justice. *Cox*, 379 US at 560, 564-565. The Court explained that "[t]he conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association." *Id*. at 563. The Court ultimately concluded that the statute at issue was facially valid because "the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Id*. at 564. Accordingly, to the extent that MCL 750.120a(1) may preclude certain limited courthouse demonstrations, the United States Supreme Court has countenanced that result given the government's strong interest in the impartial administration of justice. Defendant's First Amendment argument fails.

IV. DUE PROCESS

A. VAGUENESS

Defendant next argues that MCL 750.120a, as interpreted and applied by the trial courts, is void for vagueness because it: (1) fails to provide proper notice to citizens "that the distribution of a pamphlet of general information on a public sidewalk to a person who was merely summoned for potential jury duty is a criminal act," (2) is susceptible to arbitrary and discriminatory enforcement, and (3) as erroneously interpreted and applied, impinged on his First Amendment rights.

We review de novo "challenges to the constitutionality of a statute under the void-for-vagueness doc-

trine." *People v Lawhorn*, 320 Mich App 194, 197 n 1; 907 NW2d 832 (2017). "The 'void for vagueness' doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law." *State Treasurer v Wilson (On Remand)*, 150 Mich App 78, 80; 388 NW2d 312 (1986). "A penal statute may be unconstitutionally vague if it (1) fails to provide fair notice of the conduct proscribed, (2) permits arbitrary and discriminatory enforcement, or (3) is overbroad and impinges on First Amendment freedoms." *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004). "A vagueness challenge must be considered in light of the facts at issue." *Id*. "When presented with a vagueness challenge, we examine the entire text of the statute and give the words of the statute their ordinary meanings." *People v Morey*, 230 Mich App 152, 163; 583 NW2d 907 (1998), aff'd 461 Mich 325 (1999).

"To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011). "A statute cannot use terms that require persons of ordinary intelligence to speculate regarding its meaning and differ about its application." *Sands*, 261 Mich App at 161. "For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id*.

Defendant first asserts that if the trial courts' interpretation of MCL 750.120a(1) is correct, then the law is unconstitutionally vague because "[n]o statute, case, or any other Michigan authority exists which would [have] given notice to the citizenry that the

word 'juror' included anyone who had simply received a summons in the mail." However, a person of ordinary intelligence does not have to speculate as to the word's meaning. Rather, the definition of "juror" is readily ascertainable to anyone with access to a dictionary. See *Sands*, 261 Mich App at 161. Further, defendant's assertion that a person of ordinary intelligence comparing MCL 750.120 and MCL 750.120a(1) would look at the statutes and naturally conclude that one covers a person summoned for jury duty while the other does not, lacks merit for the reasons already stated.

Defendant also suggests that MCL 750.120a(1) is susceptible to arbitrary and discriminatory enforcement, asserting that his own arrest and prosecution were based on the government's "animus towards the content of his pamphlet." Even if the decision to arrest and charge defendant was primarily based on the content of the pamphlet, the pamphlet provided evidence of his intent to influence a juror and was relevant to his prosecution. Additionally, although a statute may be misapplied by officials, our primary focus is on whether the statute *permits* arbitrary and discriminatory enforcement, not whether an isolated official happens to arbitrarily enforce it. See *Allison v Southfield*, 172 Mich App 592, 596; 432 NW2d 369 (1988) ("Even if one of the evils sought to be prevented by the vagueness doctrine is the vesting of unstructured discretion and the resultant arbitrary and [discriminatory] enforcement of the law, the doctrine is not triggered unless the wording of the promulgation is itself vague.") (citation omitted). Defendant has not shown that MCL 750.120a(1) is unconstitutionally vague. *People v Vandenberg*, 307 Mich App 57, 62; 859 NW2d 229 (2014).

B. FAIR TRIAL

Lastly, defendant argues that he was denied his right to a fair trial because the district court precluded him from arguing the elements of MCL 750.120a(1) and because he was not permitted to cross-examine 77th District Court Magistrate Thomas G. Lyons regarding purported bias against him.

We review de novo whether a defendant received a fair trial. *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). With regard to the elements of jury tampering, defendant asserts he should have been allowed to argue that the absence of an actual trial in Yoder's case precluded his conviction under MCL 750.120a(1). However, the statute contains no requirement that a trial take place, and the argument is duplicative of his underlying position, rejected in this opinion, that only those selected and sworn for jury service may be considered jurors under the statute.

With regard to Magistrate Lyons's purported bias, "[a] primary interest secured by the Confrontation Clause [US Const, Am VI] is the right of cross-examination." *People v Gaines*, 306 Mich App 289, 315; 856 NW2d 222 (2014). "Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony." *People v Ho*, 231 Mich App 178, 190; 585 NW2d 357 (1998). However, "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right

of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998).

Defendant contends specifically that he wished to examine Magistrate Lyons regarding conduct at the arraignment, when Magistrate Lyons allegedly "set an unconstitutionally high bond of $150,000.00 (10%)" and "refused to appoint [him] an attorney," and that the district court erred by denying him the opportunity to do so. Defendant identifies caselaw suggesting that a defendant has a constitutional right to examine a witness's bias, see *id*. at 644; *Hayes v Coleman*, 338 Mich 371, 380-381; 61 NW2d 634 (1953), and the matters identified by defendant arguably show that Magistrate Lyons was biased against him. However, even if the district court erred by precluding cross-examination, the error would be harmless.

> [V]iolations of the right to adequate cross-examination are subject to a harmless-error analysis. Whether such an error is harmless in a particular case depends on a host of factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. [*Kelly*, 231 Mich App at 644-645.]

Magistrate Lyons's testimony merely provided context for the events of the day. He testified about when he learned of the pamphlets, his interaction with defendant, and his subsequent conversation with 77th District Court Judge Peter M. Jaklevic. Further, he testified that Yoder's case was the only case scheduled for trial on the day in question. This testimony was cumulative to that of other witnesses, namely 77th District Court Judge Peter M. Jaklevic, and had little bearing on whether defendant actually violated MCL

750.120a(1). Moreover, we see nothing to suggest that the jury would have reached a different result had it concluded that Magistrate Lyons was biased against defendant and not credible. As a result, we cannot hold that defendant was denied a fair trial on this basis.

Affirmed.

CAMERON, J., concurred with MURRAY, C.J.

MURPHY, J. (*dissenting*). I conclude that the jury-tampering statute, MCL 750.120a, is simply not implicated under the circumstances presented in this case. Therefore, I would reverse defendant's misdemeanor conviction. Accordingly, I respectfully dissent.

We review de novo issues of statutory construction. *People v Pinkney*, 501 Mich 259, 267; 912 NW2d 535 (2018). When interpreting a statute, this Court first focuses on the plain language of the statute, with the goal of giving effect to the intent of the Legislature. *Id*. at 268. We must read individual words and phrases in the context of the entire legislative scheme, examining the statute as a whole. *Id*. When the language of the statute is unambiguous, the statute must be enforced as written, and no further judicial construction is required or permitted. *Id*. If at all possible, every word in a statute should be given meaning and no word should be rendered nugatory or treated as surplusage. *Id*. at 288.

MCL 750.120a(1) provides that "[a] person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor . . . ." With respect to *mens rea*, under the plain language of the statute, a person's conduct in attempting to influence a juror's decision by

way of argument or persuasion must be willful. Next, given that the statute punishes "attempts" to influence a juror, a person need not successfully influence a juror's decision in order to be held criminally responsible. Additionally, Subsection (1) of MCL 750.120a is limited to proscribing conduct and communications entailing "argument or persuasion."

In defining the meaning of the term "juror" so as to accurately decipher the Legislature's intent, I believe it is vital to take into consideration the surrounding language and the context in which the term is used in MCL 750.120a(1). Under MCL 750.120a(1), argument or persuasion cannot be employed in a willful attempt to influence "the decision of a juror in any case." In my view, the statutory phrase "the decision of a juror in any case" tells us all that we need to know in resolving this appeal, making it unnecessary and improper to resort to dictionary definitions of the term "juror" or to engage in a constitutional analysis. I conclude that a person is not "a juror in a[] case," let alone a juror who has the capacity to make a "decision," at the point in time that he or she has merely been summoned for jury duty and arrives at the courthouse. Rather, at the very earliest, one who has been selected as a venireperson, as distinguished from the larger group of individuals summoned for jury duty, might perhaps be characterized as a juror in a case, given that a venireperson would be subjected to voir dire for purposes of a particular case. See *People v Bryant*, 491 Mich 575, 583 n 4; 822 NW2d 124 (2012) (differentiating a venire, which consists of a panel of potential jurors called into a courtroom, from a group of people summoned to appear for jury duty). In sum, I cannot conclude that MCL 750.120a is implicated until the trial process in a case is underway, starting with selection of the venire, if even at that point.

This position is buttressed by the language in MCL 750.120a(1), which provides an exception for argument or persuasion that is "part of the proceedings in open court *in the trial of the case* . . . ." (Emphasis added.) This language presupposes that a trial was indeed commenced. Moreover, MCL 750.120a(3) provides that Subsection (1) does not "prohibit any *deliberating juror* from attempting to influence other members of the same jury by any proper means." (Emphasis added.) This language contemplates not only a trial, but a concluded trial, followed by jury deliberations.

Giving meaning to the words in MCL 750.120a(1), such that none of the words are treated as surplusage, and reading the words and phrases in the context of the whole statute, the Legislature plainly envisioned MCL 750.120a(1) being implicated only after the trial process has commenced. Jennifer Johnson and Theresa DeVries were simply not *jurors in the case* against Andrew Yoder when approached by defendant and given the juror-nullification literature.

In further support and contrary to the majority's view, I believe that the Legislature's reference to a person "summoned as a juror" in MCL 750.120, absent comparable language in MCL 750.120a(1), reveals that the MCL 750.120a(1) reference to "a juror" was solely meant to encompass seated jurors and perhaps venirepersons. MCL 750.120 was enacted in 1931 pursuant to 1931 PA 328, and MCL 750.120a was added in 1955 pursuant to 1955 PA 88. Clearly, had the Legislature intended for MCL 750.120a(1) to cover a person summoned as a juror, it would and could have used the previously employed and more expansive language, yet the Legislature chose not to do so. "Generally, when statutory language is included in one statutory section but omitted from another, we presume that the draft-

ers acted intentionally to include or exclude the language." *People v Robar*, 321 Mich App 106, 121; 910 NW2d 328 (2017). I find the majority's arguments rejecting application of this statutory principle strained and unavailing. I do wish to emphasize, however, that although I conclude that defendant did not commit a criminal misdemeanor under MCL 750.120a(1), I am not prepared to state, nor is it necessary to state, that a trial court, under its inherent and constitutional powers, cannot prohibit or control the possible tainting of summoned jurors.

I would reverse defendant's conviction. Accordingly, I respectfully dissent.

AUTO-OWNERS INSURANCE COMPANY v COMPASS HEALTHCARE, PLC

Docket No. 339799. Submitted December 5, 2018, at Lansing. Decided December 18, 2018, at 9:00 a.m. Leave to appeal denied 505 Mich 865 (2019).

Auto-Owners Insurance Company, Home-Owners Insurance Company, and Caleb Casanova filed an action in the Ingham Circuit Court against Compass Healthcare, PLC (Compass Health) and Lansing Neurosurgery (collectively, defendants), seeking a declaration whether defendants could collect from Casanova a "balance bill"—that is, the difference between the amount defendants charged for medical services Compass Health provided to Casanova and the amount of the partial payment plaintiff insurers had approved and paid to defendants on behalf of Casanova for those medical services—and seeking attorney fees under MCL 500.3148(2); Casanova also sought relief under Michigan's regulation of collection practices act (MRCPA), MCL 445.251 *et seq*. In July 2014, Casanova was injured in a motor vehicle accident, and Compass Health billed Casanova $1,859 for the medical services it provided to Casanova after the accident. On August 5, 2014, Home-Owners paid Compass Health $1,076.14, the amount Home-Owners determined was reasonable and necessary for the services Compass Health had provided to Casanova. Between August 13, 2014, and November 15, 2016, Compass Health sent multiple balance bills to Casanova for the remaining $782.86, even though Home-Owners had sent Compass Health numerous letters throughout that period, advising Compass Health that Home-Owners had made reasonable payment on behalf of Casanova in accordance with MCL 500.3107 and MCL 500.3157 of the no-fault act, MCL 500.3101 *et seq*., and that Compass Health was to cease and desist having direct contact with Casanova. Defendants moved for summary disposition, and plaintiffs countermoved for summary disposition. The court, William E. Collette, J., granted summary disposition in favor of plaintiffs and awarded attorney fees and costs to plaintiffs. The court reasoned that a medical provider could not collect the balance-bill amount from an insured after the insurer had made a payment of personal protection insurance benefits (PIP benefits) under the no-fault act for the reasonable and necessary charges and that

the medical provider had to dispute the reasonableness of the partial payment with the insurer, not the insured, subject to the one-year-back rule of MCL 500.3145. The court awarded damages to Casanova after it concluded that defendants had violated the MRCPA and awarded all plaintiffs reasonable attorney fees and costs under MCL 445.252(e) because of the MRCPA violation. Two days after the trial court issued its opinion and order, the Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), holding that healthcare providers do not possess a statutory cause of action to recover PIP benefits under the no-fault act, reversing prior decisions of the Court of Appeals that had concluded to the contrary. In light of *Covenant*, defendants moved for reconsideration of the trial court's order. On reconsideration, the court denied defendants' motion, reasoning that although *Covenant* established that defendants had a legal right under the no-fault act to seek payment directly from Casanova, *Covenant* did not address the issue in this case: whether defendants could seek payment of the balance bill from Casanova on a contractual liability theory, rather than under the no-fault act, after defendants' charges were audited for reasonableness and plaintiff insurers had made a partial payment based on the findings of those audits. The court further explained that *Covenant* did not alter the standard of reasonableness or an insurer's duty to audit medical provider bills to determine reasonableness under the no-fault act and that defendants therefore did not have an unfettered right to pursue Casanova for the balance bill. The court noted that defendants had admitted in their pleadings that the balance bill was unenforceable under MCL 500.3145. Defendants appealed.

The Court of Appeals *held*:

1. MCL 500.3157 provides that a medical provider may only charge a reasonable amount for the products, services, and accommodations rendered to an injured person for an accidental bodily injury covered by personal protection insurance. In turn, MCL 500.3107(1)(a) provides that a no-fault insurer is only responsible for paying allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. Accordingly, under the no-fault act, a medical provider is paid only for reasonable and necessary charges actually incurred. No-fault insurers are required by the act to challenge the reasonableness of a medical provider's charges. However, to challenge the reasonableness of a payment, a medical provider must file a suit against the injured person in court, alleging that the no-fault insurer's

failure to fully reimburse the provider for medical bills violated the no-fault act; medical providers have the burden of establishing by a preponderance of the evidence that their charges were reasonable. The Supreme Court's decision in *Covenant* did not change or affect the standard of reasonableness applicable to a medical provider's charges under MCL 500.3157 or the insurer's duty to audit such charges under MCL 500.3107(1)(a) before reimbursing the provider for the services it provided to an insured person covered by personal protection insurance. Instead, *Covenant* placed the dispute over the reasonableness of the charges between the patient-insured and the medical provider; it did not alter the method of disputing the reasonableness of the amount paid. A medical provider's claim against an insured is not based on an implied-contract theory; that is, it is not an attendant contract claim. Instead, the claim is one for payment of services rendered to an injured person covered by personal protection insurance under the no-fault act; to hold otherwise would allow medical providers to circumvent the protective nature of the no-fault act. The trial court correctly determined that *Covenant* did not address the question at issue in this case. The trial court also correctly concluded that defendants' balance-bill claim was not based on an implied contract but was a claim for benefits under the no-fault act. The trial court did not abuse its discretion when it denied defendants' motion for reconsideration because there was no basis on which to do so.

2. MCL 500.3145, the so-called one-year-back rule, provides that an action for recovery of PIP benefits payable under the no-fault act for accidental bodily injury may not be commenced later than one year after the date of the accident causing the injury unless the insurer has previously made a payment of PIP benefits for the injury. If a payment has been made, the action may be commenced at any time within one year after the most recent allowable expense has been incurred. In this case, defendants never filed an action in court challenging the reasonableness of Home-Owners' payment on behalf of Casanova, and defendants did not raise that issue in their motion for summary disposition or present evidence regarding the reasonableness of the full charge. Accordingly, the trial court correctly determined that any claim defendants may have had against Casanova was barred by the one-year-back rule.

3. The trial court erred by awarding reasonable attorney fees and costs to Home-Owners and Auto-Owners under MCL 445.257(2); plaintiff insurers were not entitled to such fees and costs because they did not file a claim against defendants under the MRCPA.

Affirmed in part and reversed in part.

BOONSTRA, P.J., concurring, agreed with the result reached by the majority but disagreed with some of the majority's analysis in reaching that result. Because the no-fault act is a statutory insurance scheme and defendants' relationship with Casanova arose from the provision of healthcare services, any cause of action by defendants against Casanova for the balance bill arose from the implied contract for the provision of healthcare services; that is, defendants' claim did not arise under the no-fault act but, rather, under an implied contract. Accordingly, Judge BOONSTRA would have concluded that the trial court erred when it determined that defendants' claim against Casanova was not contract-based. Although defendants' claim against Casanova was contract-based, public policy underlying the no-fault act—to afford persons injured in a motor vehicle accident a right to PIP benefits and a right to have their insurer defend and indemnify them with respect to a claim for such benefits, subject to the one-year-back rule—demanded that the MCL 500.3145(1) one-year-back rule of the no-fault act applied in this case. The public policy on which the no-fault act is based would be subverted if the six-year period of limitations for contract claims applied under these facts. Defendants' balance-bill claim against Casanova failed because the manner in which they sought to recover the money—sending the bill directly to Casanova instead of challenging the reasonableness of the claim in court—circumvented the MCL 500.3157 reasonable-charge limitation and prevented Casanova from proceeding in a timely manner under MCL 500.3145 to invoke his insurers' duty to defend and to indemnify him with respect to the balance bill, contrary to the public policy of the no-fault act. Judge BOONSTRA agreed with the majority's conclusion that any claim defendant had to recover the balance-bill amount from Casanova was time-barred under MCL 500.3145 because defendants failed to bring an action in the trial court by July 4, 2015, one year after the most recent allowable expense was incurred. Judge BOONSTRA also agreed with the majority that the trial court erred by awarding reasonable attorney fees to Auto-Owners and Home-Owners under MCL 445.257(2).

1. INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — INJURED PERSON'S BENEFITS — MEDICAL PROVIDERS' RIGHT TO SEEK BALANCE BILLS — NO-FAULT ACT'S METHOD OF CHALLENGING REASONABLENESS APPLIES.

Under the no-fault act, MCL 500.3101 *et seq*., a medical provider is paid only for reasonable and necessary charges actually incurred; the Supreme Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), did not change or

affect the standard of reasonableness applicable to a medical provider's charges under MCL 500.3157 or the insurer's duty to audit such charges under MCL 500.3107(1)(a) before reimbursing the provider for the services it provided to an injured person covered by personal protection insurance; that is, *Covenant* did not alter the method of disputing the reasonableness of the amount paid, and a medical provider must challenge the reasonableness of the payment by filing a suit against the injured person.

2. INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — INJURED PERSON'S BENEFITS — BALANCE-BILL CLAIM NOT BASED ON IMPLIED CONTRACT — BALANCE-BILL CLAIMS SUBJECT TO NO-FAULT'S ONE-YEAR-BACK RULE.

A medical provider's claim for a balance bill resulting from services provided to an insured covered by personal protection insurance—that is, a claim for the difference between the amount the medical provider charged for medical services provided to an injured person and the amount of the partial payment the injured person's insurer approved and paid to the providers on behalf of the injured person—is not based on an implied-contract theory; instead, the claim is one for payment of services rendered to an injured person covered by personal protection insurance benefits under the no-fault act, and the claim is subject to the one-year limitations period of MCL 500.3145 (MCL 500.3101 *et seq*.).

Dykema Gossett PLLC (by *Lori McAllister*) for Auto-Owners Insurance Company and Home-Owners Insurance Company.

Lennon, Miller, O'Connor & Bartosiewicz, PLC (by *Tyren R. Cudney*) for Caleb Casanova.

Sinas Dramis Brake Boughton & McIntyre, PC (by *George Sinas*, *Thomas G. Sinas*, *Catherine E. Tucker*, and *Joel T. Finnell*) for Compass Healthcare, PLC.

Foster, Swift, Collins & Smith, PC (by *Scott L. Mandel* and *Joshua K. Richardson*) for Lansing Neurosurgery.

Before: BOONSTRA, P.J., and JANSEN and GADOLA, JJ.

PER CURIAM. Defendants[1] appeal as of right the trial court's opinion and order denying their motion for summary disposition, sanctions, and attorney fees and, instead, granting summary disposition and awarding attorney fees and costs to plaintiffs.[2] We affirm the trial court's order granting summary disposition in favor of plaintiffs and reverse the trial court's award of reasonable attorney fees and costs to Auto-Owners and Home-Owners under MCL 445.257(2).

I. RELEVANT FACTUAL BACKGROUND

On July 3, 2014, Caleb Casanova was injured in an automotive accident. Casanova sustained a concussion, a comminuted fracture of his C2 vertebra, and various other minor injuries. Casanova was admitted to the intensive care unit of Sparrow Hospital, and defendants[3] provided treatment to him on July 4, 2014. Compass Health submitted a bill to Home-Owners, Casanova's no-fault insurer, for $1,859. On August 5, 2014, Home-Owners submitted payment to Compass Health in the amount of $1,076.14, the amount Home-Owners determined was reasonable and necessary for the services Compass Health provided to Casanova. On August 13, 2014, Compass Health sent an invoice directly to Casanova for the remaining $782.86. A second statement was sent to Casanova on September 5, 2014.

On September 18, 2014, Home-Owners sent a second letter to Compass Health, indicating that if Compass Health wished to dispute the reasonableness of its

[1] Compass Healthcare, PLC (Compass Health), and Lansing Neurosurgery (collectively, defendants).

[2] Auto-Owners Insurance Company (Auto-Owners), Home-Owners Insurance Company (Home-Owners), and Caleb Casanova.

[3] Lansing Neurosurgery is a division of Compass Health.

$1,076.14 payment, it was to deal with Home-Owners directly, not with Casanova. Regardless, Compass Health sent Casanova invoices on October 20, 2014, and on February 11, 2016. On March 1, 2016, Home-Owners sent a second letter to Compass Health, advising that reasonable payment had been made to Compass Health on behalf of Casanova in accordance with MCL 500.3107 and MCL 500.3157. Home-Owners informed Compass Health that it could pursue legal action if it wished to dispute the reasonableness of the payment but that it was to cease having direct contact with Casanova. Nevertheless, Compass Health sent two more invoices to Casanova on April 11, 2016, and April 20, 2016.

On May 5, 2016, Home-Owners sent a third letter to Compass Health: this time, a notice to cease and desist. According to Home-Owners and Auto-Owners, the letter advised Compass Health that Home-Owners was "the only proper party to any dispute as to the reasonableness of the payment" and that all collections efforts directed at Casanova should be ceased. Yet on June 10, 2016, July 11, 2016, and August 10, 2016, Compass Health again sent invoices directly to Casanova.

On November 15, 2016, plaintiffs filed a five-count complaint against defendants, seeking a declaratory judgment under the no-fault act, MCL 500.3101 *et seq*., "as to whether Compass [Health] may attempt to obtain payment" of its "balance bill"[4] directly from Casanova, regardless of the reasonable payment made

[4] The phrase "balance billing" refers to a "healthcare provider's practice of requiring a patient or other responsible party to pay any charges remaining after insurance and other payments and allowances have been applied to the total amount due for the provider's services." *Black's Law Dictionary* (10th ed).

by Home-Owners. Plaintiffs also sought injunctive relief, requesting that Compass Health be prevented from contacting Casanova regarding collections pending the outcome of the instant action. Casanova also sought relief under Michigan's regulation of collection practices act (the MRCPA), MCL 445.251 *et seq*., seeking damages. Finally, all plaintiffs sought attorney fees pursuant to MCL 500.3148(2).

In lieu of an answer, defendants moved for summary disposition pursuant to MCR 2.116(C)(4) and (8) and for sanctions pursuant to MCR 2.114(F). Defendants argued that plaintiffs' claim for declaratory relief was moot because the underlying debt giving rise to plaintiffs' claim was unenforceable. Specifically, defendants admitted that the "debt is unenforceable . . . pursuant to the one-year-back rule that governs the recovery of benefits under" MCL 500.3145. Similarly, defendants argued that because the underlying debt was unenforceable, plaintiffs' claim for injunctive relief was not yet ripe for review. Finally, defendants argued that plaintiffs were not entitled to attorney fees under MCL 500.3148(2) because plaintiffs could not recover fees related to a lawsuit they initiated. Defendants also sought sanctions, claiming that plaintiffs' lawsuit was "frivolous."

In response, Casanova argued that despite defendants' admission that the balance owed was unenforceable as a matter of law, defendants continued to contact him in an effort to collect the balance, and for that reason, plaintiffs are entitled to the relief requested in their complaint. With his response to defendants' motion for summary disposition, Casanova included a countermotion for summary disposition pursuant to MCR 2.116(C)(10), which Home-Owners

concurred with. Plaintiffs agreed that all the medical expenses incurred by Casanova were covered under his no-fault insurance policy with Home-Owners and that pursuant to MCL 500.3157, Home-Owners had paid defendants a reasonable amount for services actually rendered. Casanova asserted that he was therefore not responsible for the difference and that in light of defendants' own admission that the balance owed was unenforceable, summary disposition in favor of plaintiffs was appropriate.

Defendants replied, now arguing that plaintiffs had misunderstood their argument: although the balance bill was unenforceable under the no-fault act, Casanova still incurred an implied contractual obligation to pay independent of the act. Defendants articulated that they had not raised this argument earlier because plaintiffs had never claimed the balance was unenforceable under contract law and defendants were not required to negate every theory not raised by plaintiffs.

Following a hearing on defendants' motion for summary disposition and Casanova's countermotion for summary disposition, the trial court entered a written opinion and order granting summary disposition in favor of and awarding attorney fees and costs to plaintiffs and denying defendants summary disposition, sanctions, and attorney fees and costs. The trial court ultimately concluded that Michigan law is well settled, that there is no factual dispute that Home-Owners is Casanova's no-fault insurer, and that Home-Owners is, accordingly, "liable to pay benefits for Casanova's care, treatment, and rehabilitation arising out of this injury." Further, the court ruled that under MCL 500.3107(1)(a), Home-Owners must pay all "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services

and accommodations . . . ." The court noted that defendants, as medical providers, also have duties under the no-fault act, including the duty to charge no more than a reasonable amount for the products, services, and accommodations rendered. As the court explained, this means that a medical provider " 'shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.' " (Quoting MCL 500.3157.)

The trial court went on to conclude that "it is a well-settled matter of law that insurance providers like Home-Owners . . . have an obligation to audit charges and make only reasonable payments as part of a cost-policing function meant to provide health care providers an incentive to keep costs to a minimum." Further, the court stated that simply because plaintiffs did not frame their complaint as requesting a declaration about Casanova's contractual liability did not mean that plaintiffs' complaint "failed to state a claim or allege sufficient facts." Indeed, plaintiffs' "argument, through the Complaint and pleadings, is clearly that they are seeking a declaration on the question of whether the practice of reasonable partial payments made by insurers to providers allowed by the No-Fault Act should result in liability to the insured." To that end, the trial court concluded that given relevant caselaw, statutory interpretation, and public policy,

> a [medical] provider cannot lawfully charge more than a reasonable amount for products, services, and accommodations, [and it] is clear, that once an insurer has made its required audit, determination, and payment of benefits for the reasonable and necessary charges billed by providers, a provider cannot then pursue and collect the remainder of the bill from a patient-insured. Where a provider disputes

> an insurer's determination and subsequent partial payments, that dispute belongs solely between the provider and insurer, and is subject to the one-year-back provision of MCL 500.3145.

Finally, the trial court concluded that by sending defendant at least 10 collections letters or billing statements and by ignoring the cease and desist letters sent by Home-Owners, defendants had willfully violated the MRCPA, "by making misleading statements to Casanova that he owed the balance bill, where [d]efendants were on notice that Casanova's liability was in dispute and where Casanova never owed the bill charged in accordance with the No-Fault Act, pursuant to MCL 445.252(e)." The court ruled that Casanova was therefore "entitled to $150 in damages per violation, that being each of the ten billing statements sent to Casanova in an attempt to collect a debt he did not owe." The trial court reiterated that because defendants violated MCL 445.252(e), all plaintiffs were entitled to reasonable attorney fees and costs under MCL 445.257(2).

Two days after the trial court entered its opinion and order, our Supreme Court issued its decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). On the basis of that opinion, defendants moved for reconsideration of the trial court's opinion and order under MCR 2.119(F). Defendants argued that after *Covenant*, medical providers have "no statutory cause of action under the No-Fault Act against insurers, but that they are not remediless as providers can seek payment from the injured person for their reasonable charges." Defendants asserted that, because *Covenant* is controlling "and precludes a finding in favor of [p]laintiffs," reconsideration was appropriate under MCR 2.119(F).

The trial court entered an opinion and order denying defendants' motion for reconsideration on August 7, 2017. The trial court concluded, in relevant part:

> This Court acknowledges that, pursuant to *Covenant*, [d]efendants had a legal right to seek payment directly from Casanova under the provisions of the No-Fault Act. However, the issue presented before this Court was a separate consideration: whether health care providers could seek payment of "balance bills" from a patient-insured on a *contractual* liability theory, rather than under the No-Fault Act, after a provider's charges were audited for reasonableness and the provider was paid a partial payment based on the findings of those audits. This Court finds that although the May 23, 2017 Opinion & Order erred with regard to the determination that providers must dispute partial payments with insurers, rather than patient-insured, it does not affect this Court's determination that a provider does not have a *contractual* right to pursue a patient-insured after a provider's charges have been determined to be unreasonable in accordance with the No-Fault Act, and therefore, a different disposition of the motion is not required.
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> This Court determined that the provisions of the No-Fault Act requiring a provider to charge only "reasonable and necessary charges," and the provisions of the Act requiring an insurer to pay "[a]llowable expenses consisting of all reasonable charges . . ." imposed a standard of reasonableness that an insurer was duty-bound to enforce through audits. MCL 500.3107, MCL 500.3157. The *Covenant* decision did not change or affect either the standard of reasonableness or the insurer's duty to audit; indeed, the *Covenant* decision noted that a provider may seek payment only for a provider's *reasonable* charges. Since the present case raises the issue of a "balance bill," *Covenant* does not provide [d]efendants with an unfettered right to pursue the patient-insured, Casanova, because [d]efendants' charges were found to be unreason-

> able. This Court erred when it placed the dispute over whether [d]efendants' charges were reasonable between [d]efendants and Auto-Owners and Home-Owners, as *Covenant* removed a provider's cause of action against an insurer absent an assignment of no-fault benefits, but *Covenant* does not remove the necessity of resolving the dispute under the provisions of the No-Fault Act. [Citation omitted.]

The trial court further noted that defendants had admitted in their pleadings that the balance in question was unenforceable under the no-fault act's one-year-back rule. In light of the foregoing, the trial court concluded that "a different disposition of this case is not required." This appeal followed.

II. MEDICAL PROVIDER'S RIGHT TO SEEK PAYMENT OF BALANCE BILLS

Defendants first argue that the trial court erroneously refused to reverse its denial of summary disposition in plaintiffs' favor and that it instead erroneously concluded that despite *Covenant*, "medical providers have no *contractual* right to seek payment from their patients once their patients' insurers have paid the portion of the medical bills *that the insurer deems reasonable*." We disagree.

"This Court reviews for an abuse of discretion a trial court's ruling on a motion for reconsideration." *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018). An abuse of discretion occurs when the trial court's decision is "outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted). "MCR 2.119(F)(3) requires the party moving for reconsideration to 'demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correc-

tion of the error.' " *Id*. (citation omitted). "The trial court has 'considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties.' " *Id*. at 264-265 (citation omitted.) Additionally, we review de novo questions of law and the interpretation of statutes. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 309-310; 901 NW2d 577 (2017).

Defendant correctly argues that in *Covenant*, our Supreme Court held that "healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance [PIP] benefits under the no-fault act" but that "a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges." *Covenant*, 500 Mich at 196, 217. Accordingly, pursuant to MCR 2.119(F)(3), the trial court was well within its discretion to consider defendants' motion for reconsideration and did, in fact, correctly conclude that it had previously erred by concluding that defendants were required to pursue only Home-Owners. After *Covenant*, the trial court correctly concluded on reconsideration that defendants had a "legal right to seek payment directly from Casanova under the provisions of the No-Fault Act."

The trial court also correctly concluded that despite our Supreme Court's holding in *Covenant*, defendants were still not entitled to summary disposition in their favor. The original question before the trial court was whether defendants could "seek payment of 'balance bills' from a patient-insured on a *contractual* liability theory, rather than under the No-Fault Act, after a provider's charges were audited for reasonableness and the provider was paid a partial payment based on the

findings of those audits." We agree with the trial court and conclude that the answer to the question is no.

Under MCL 500.3157, a medical provider may only charge a "reasonable amount for the products, services and accommodations rendered" to an injured person for an accidental bodily injury covered by personal protection insurance. Likewise, under MCL 500.3107(1)(a), a no-fault insurer is only responsible for paying "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Therefore, the trial court did not abuse its discretion by concluding that the "*Covenant* decision did not change or affect either the standard of reasonableness or the insurer's duty to audit; indeed, the *Covenant* Court noted that a provider may seek payment only for a provider's *reasonable* charges."

Our Supreme Court's decision in *Covenant* also did not affect the validity of this Court's decision in *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365; 670 NW2d 569 (2003), aff'd 472 Mich 91; 693 NW2d 358 (2005) (*AOPP*). This Court confirmed in *AOPP* that under the no-fault act, a medical provider will only be paid for reasonable and necessary charges actually incurred. *AOPP*, 257 Mich App at 374. The no-fault act

> requires that an insurer only pay on behalf of the insured a "reasonable" charge for the particular product or service. However, the Legislature has not defined what is "reasonable" in this context, and, consequently, insurers must determine in each instance whether a charge is reasonable in light of the service or product provided. [*Id*. at 379.]

Again, in *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 448; 814 NW2d 670 (2012), this

Court concluded that no-fault insurers are *required* to challenge the reasonableness of a medical provider's charges and that medical providers should expect no less. Further, the " 'customary' fee a particular provider charges under [MCL 500.3157] does not define what constitutes a 'reasonable charge' under [MCL 500.3107]. . . . Rather, the 'customary fee' is simply the cap on what health-care providers can charge, and is not, automatically, a 'reasonable' charge requiring full reimbursement under [MCL 500.3107]." *AOPP*, 257 Mich App at 377.

However, medical providers are permitted to "challenge [the] failure to fully reimburse them for medical bills as a violation of" the no-fault act. *Id*. at 380. They must do so in the trial court, and the providers have the burden of establishing by a preponderance of the evidence that their charges were reasonable. *Id*. See also *Bronson*, 295 Mich App at 450, in which this Court reiterated that the no-fault act contemplates that

> insurers will assess the reasonableness of a provider's charges, paying that portion deemed reasonable, with the provider having the prerogative to then challenge the insurer's decision not to pay the entire charge submitted by filing suit. Once an action is filed, the provider has the burden of proving by a preponderance of the evidence the reasonableness of its charges.

As the trial court concluded in its opinion and order on reconsideration, "[t]he only effect of *Covenant* was to place the dispute over the reasonableness of the charges between a provider and a patient-insured, rather than between a provider and an insurer." It did not alter the *method* of disputing the reasonableness of the amount paid.

In this case, it is clear that defendants never filed an action against Home-Owners or against Casanova,

challenging Home-Owners' determination of the reasonableness of its charges. Likewise, defendants never raised the reasonableness of its charges as an issue in its motion for summary disposition or any other responsive pleading, and never presented any evidence from which the trial court could have concluded by a preponderance of the evidence that the charge of $1,859 was reasonable and necessary for the services provided. Instead, defendants have chosen to harass Casanova over $782.86 outside the courts since 2014.

To conclude that defendants could prevail on the theory of an implied contract is contrary to the purpose of the no-fault act, and its implications would allow medical providers to circumvent the protective nature of the act. Therefore, we conclude that any claim defendants may have against Casanova would be for payment of services rendered to an injured person "covered by personal protection insurance" under the no-fault act. See MCL 500.3157. Accordingly, reversal of the trial court's original opinion and order granting summary disposition in favor of plaintiffs was unnecessary, and it was not an abuse of the trial court's discretion to refuse to do so.

III. ONE-YEAR-BACK RULE

Second, defendants argue that the trial court erroneously concluded that medical providers must file suit within one year from the date of providing medical services for automobile-related injuries because the one-year-back rule does not apply to benefits payable under Michigan contract law. Defendants further argue that after *Covenant*, a claim by a medical provider against its patient is not viewed as an action for recovery of PIP benefits under MCL 500.3145; rather, it is an "attendant contract claim." We disagree.

Again, "[t]his Court reviews for an abuse of discretion a trial court's ruling on a motion for reconsideration." *Sanders*, 323 Mich App at 264.

We disagree with defendants' interpretation of *Covenant* with respect to whether a claim against a medical provider is now viewed as an action for recovery of PIP benefits or a contract claim. Defendants would like this Court to conclude that after *Covenant*, a medical provider's claim against a patient-insured is an "attendant contract claim." However, the *Covenant* Court explicitly stated:

> We conclude today only that a healthcare provider possesses no statutory right to sue a no-fault insurer. . . . This Court need not consider whether [a medical provider] possesses a contractual right to sue . . . because [the medical provider] did not allege any contractual basis for relief in its complaint. [*Covenant*, 500 Mich at 217 n 39.]

Likewise, defendants never filed a complaint seeking payment from either Home-Owners or Casanova under a theory of implied contract or otherwise. The first time defendants advanced a theory of contractual liability was in a reply in opposition to Casanova's response to defendants' motion for summary disposition. Moreover, given our conclusion that any claim by defendants would still fall squarely within the parameters of the no-fault act, defendants' recovery would be subject to the one-year-back rule found in MCL 500.3145.

In this case, Home-Owners made a reasonable payment to Compass Health on behalf of Casanova on August 5, 2014. Therefore, in order to contest the reasonableness of the amount paid or to pursue the remaining $782.86, defendants would have had to file suit against Casanova on or before August 5, 2015. See MCL 500.3145, which provides that

> [a]n action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury . . . unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If . . . a payment has been made, the action may by commenced at any time within 1 year after the most recent allowable expense . . . has been incurred.

Defendants concede that they did not file any action in the trial court. Accordingly, any claim defendants may have had against Casanova is now barred by the one-year-back rule. The trial court did not abuse its discretion by concluding the same.

Moreover, defendants conceded in their motion for summary disposition that "[p]laintiffs' debt to [d]efendants in the amount of $782.86 for the outstanding balance of the services rendered to . . . Casanova on July 4, 2014 is unenforceable as a matter of law" because defendants chose not to pursue legal action. Further, defendants conceded that "[t]he debt is unenforceable . . . pursuant to the one-year-back rule that governs the recovery of benefits under the" no-fault act. Therefore, defendants have waived this argument. See *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010), in which this Court articulated that a "party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute."

IV. RECOVERY UNDER THE MRCPA

Finally, defendants argue that the trial court erroneously granted Auto-Owners and Home-Owners relief under the MRCPA because only Casanova brought a claim. Defendants assert that Auto-Owners and Home-

Owners are therefore not entitled to the attorney fees and costs awarded by the trial court under the MRCPA. We agree.

In their brief on appeal, Auto-Owners and Home-Owners concede that "the lower court awarded attorney fees only under the MRCPA and that only Mr. Casanova sought recovery under that Act in the Complaint. As a result, Auto-Owners and [Home-Owners] withdraw their request for fees." [Footnote omitted.] Further, Auto-Owners and Home-Owners correctly note in their brief on appeal that although the trial court awarded fees to Auto-Owners and Home-Owners under MCL 445.257(2) in its original opinion and order, it had not yet ruled on the fee request before this appeal. Therefore, Auto-Owners and Home-Owners argue, "any error on this point does not justify reversal."

Only Casanova sought relief under the MRCPA. Therefore, only Casanova is entitled to damages and reasonable attorney costs and fees under MCL 445.257(2). The trial court accordingly erred by awarding such fees to Auto-Owners and Home-Owners on that basis. We reverse the trial court's grant of reasonable attorney fees and costs to Auto-Owners and Home-Owners under MCL 445.257(2).

We affirm the trial court's order granting summary disposition in favor of plaintiffs and reverse the trial court's award of reasonable attorney fees and costs to Auto-Owners and Home-Owners under MCL 445.257(2).

JANSEN and GADOLA, JJ., concurred.

BOONSTRA, P.J. (*concurring*). I concur in the result reached by the majority and in much of its reasoning.

I write separately to offer an alternative rationale. In essence, I conclude that when a healthcare provider seeks to collect on a "balance bill"[1] from an injured person who is entitled to no-fault benefits, the claim is in the nature of a contract claim; nonetheless, the contract in question is necessarily subject to principles of public policy as expressed in the no-fault act, MCL 500.3101 *et seq*. Under the circumstances of this case, those principles preclude defendants, Compass Healthcare, PLC, and Lansing Neurosurgery, from collecting on their balance bill to plaintiff Caleb Casanova.

The no-fault act is a statutory scheme that "provides a system of mandatory no-fault automobile insurance, which requires Michigan drivers to purchase personal protection insurance." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 373; 670 NW2d 569 (2003) (*AOPP*). "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3105(1). Generally, "personal protection insurance benefits are payable for . . . [a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a) (paragraph structure omitted).[2] "Personal protection insur-

[1] Generally, a balance bill is an invoice from a healthcare provider to its patient after the provider's receipt of a partial payment from an insurer, requesting payment for the difference between the original charge and the amount of the partial payment received, i.e., the "balance." See *Black's Law Dictionary* (10th ed) (defining "balance billing").

[2] By its terms, MCL 500.3107(1) limits an insurer's liability to that of paying for "reasonable" charges. Consistently with that limitation, MCL 500.3157 provides that "[a] physician, hospital, clinic or other person or

ance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents." MCL 500.3112.

This means, as is undisputed, that the no-fault act allows an injured person to bring suit against the appropriate insurer for benefits due under the act. Our Supreme Court has held, however, that a healthcare provider does not possess "a statutory cause of action against a no-fault insurer." *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 217; 895 NW2d 490 (2017).

This case, however, does not present a claim by either an injured person or a healthcare provider against a no-fault insurer. Defendants did not bring suit against either plaintiff insurers (which, as noted, *Covenant* determined they had no statutory right to do) or against plaintiff Casanova. Instead, this is an action for declaratory relief brought by the insurers and Casanova against Casanova's healthcare providers. Underlying that dispute is defendants' efforts to secure payment from Casanova for the amount of their balance bill.[3]

The questions presented in this case include whether a healthcare provider may seek payment from its patient (the injured person) for a balance bill, the

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institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered." However, "[t]he charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance." *Id*. When contested, the question of what constitutes a "reasonable" charge is generally one for the fact-finder. *AOPP*, 257 Mich App at 380. See also *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 448; 814 NW2d 670 (2012).

[3] Plaintiff insurers have already made payment to defendants for what the insurers determined to be reasonable charges for defendants' medical services to Casanova. Defendants did not bring suit against

nature of any such claim, and the extent (if any) to which the provisions of the no-fault act are implicated with respect to that claim. As noted, I conclude that a healthcare provider may do so,[4] that its claim is in the nature of contract, and that the principles of the no-fault act nonetheless are implicated so as to, in this case, preclude defendants from collecting on their balance bill to Casanova.

Given that the no-fault act is a statutory insurance scheme and that defendants' relationship with Casanova is one relating to the provision of healthcare services rather than insurance, I conclude that a claim or cause of action by defendants against Casanova for payment for those services does not arise under the no-fault act itself, but instead is necessarily one arising from contract, albeit in this case an implied contract for the provision of healthcare services. Certainly, the no-fault act is implicated, but only because Casanova is entitled to insurance coverage from plaintiff insurers with respect to payment for those healthcare services. But the no-fault act does not itself provide a right of action by a healthcare provider against its patient for payment for services rendered. That cause of action, to the extent it exists, instead lies in contract. See *McGill v Auto Ass'n of Mich*, 207 Mich App 402, 406; 526 NW2d 12 (1994) (" 'To the extent that plaintiff has any liability for these expenses [charged by the healthcare

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Casanova for payment of the balance bill but did send him a series of invoices requesting payment, even in the face of plaintiff insurers' demands that they cease doing so.

[4] The caveat to this conclusion, however, is that "the amount chargeable to the patient [under MCL 500.3157] . . . is limited, by statute, to a reasonable amount." *AOPP*, 257 Mich App at 374. See also *Covenant*, 500 Mich at 217 ("[A] provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges.").

provider] in the event his insurance does not pay, it is presumably contractual'."), quoting *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990).[5]

Indeed, no party to this case maintains otherwise. That is, plaintiffs do not dispute defendants' general contention that their claim against Casanova lies in contract. Indeed, for the reasons noted, it must. I therefore conclude that to the extent the trial court held that defendants' claim against Casanova was not contract-based, it erred.[6]

The real dispute in this case is the extent, if any, to which the limitations of the no-fault act apply to defendants' claim against Casanova notwithstanding the contractual nature of that claim. Defendants describe their contractual right as "unfettered." And they cite *Covenant* as "expressly reaffirm[ing] the legal right of medical providers to seek payment of unpaid medical bills directly from their patients." Yet they seem to acknowledge that the contractual right is fettered in at least one respect: defendants acknowledge that they remain subject to the reasonable-charge limitation of MCL 500.3157.[7] Indeed, in holding that healthcare providers have no statutory right of action against no-fault insurers, *Covenant* couched its corol-

[5] Of course, nothing about this conclusion would, in a different context, support an argument that a claim of medical malpractice should instead be characterized as one for breach of contract. See, e.g., *Grewe v Mount Clemens Gen Hosp*, 47 Mich App 111, 113-114; 209 NW2d 309 (1973), citing *Miller v Toles*, 183 Mich 252; 150 NW 118 (1914); *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722, 725-726; 373 NW2d 204 (1985).

[6] Similarly, to the extent that the majority holds that defendants' claim against Casanova arose under the no-fault act, rather than as a matter of contract, I disagree. For reasons I will note, however, the majority and I ultimately end up in the same place.

[7] Although this acknowledgment was equivocal in defendants' briefing on appeal, it was express and unequivocal at oral argument.

lary acknowledgment (that a provider may still have a claim against its patient) in terms of that limitation. *Covenant*, 500 Mich at 217 ("This conclusion [that a healthcare provider does not possess a statutory cause of action against a no-fault insurer] does not mean that a healthcare provider is without recourse; a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's *reasonable* charges.") (emphasis added); see also *Nasser*, 435 Mich at 56 n 10 ("It seems unlikely that plaintiff would have an express agreement with [his doctor] or the hospital to pay *unreasonable and unnecessary* medical expenses, and equally as unlikely that he would have an implied contractual duty to do so.") (emphasis added).

Of course, defendants did not bring suit against Casanova seeking a determination of the reasonableness of their charges. Under *AOPP*, healthcare providers "may challenge [an insurer's] failure to fully reimburse them for medical bills as a violation of the act, but they have the burden of establishing the reasonableness of the charges in order to impose liability on the insurer." *AOPP*, 257 Mich App at 380. *Covenant* clarified that any such suit must be against the injured person, rather than the insurer. *Covenant*, 500 Mich at 217. And in that event, the insurer is obligated to "defend and indemnify the insured . . . ." *AOPP*, 257 Mich App at 380. See also *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 583-584; 543 NW2d 42 (1995), overruled on other grounds by *Covenant*.

What defendants did instead was to accept plaintiff insurers' August 5, 2014 partial payment of $1,076.14[8]

[8] In certain circumstances, healthcare providers are required to accept, as payment in full, the amount paid by the insurer, and they

and to then almost immediately begin sending Casanova a series of invoices, rejecting or ignoring plaintiff insurers' entreaties for defendants to cease doing so and seeking payment of the full amount of the balance bill (for the additional amount of $782.86) without a judicial determination of the reasonableness of defendants' charges.[9] By doing so, they effectively tried to circumvent the limitations of MCL 500.3157, denied plaintiff insurers the opportunity to fulfill their legal obligation to defend and indemnify Casanova with respect to the balance bill, and did so while failing even to apprise Casanova of defendants' burden of proving reasonableness or Casanova's right to be defended and indemnified by plaintiff insurers. For the reasons that follow, it is unnecessary for us to determine the propriety of that course of conduct, but to me, it seems highly questionable on its face.

The reason that we need not decide that question in this case is that defendants' own course of conduct—forgoing a judicial determination of reasonableness in favor of sending invoices to Casanova on at least nine separate occasions between August 13, 2014, and

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therefore may not "balance bill" the patient. See, e.g., MCL 400.111b(14) ("Except for copayment authorized by the department and in conformance with applicable state and federal law, a provider shall accept payment from the state as payment in full by the medically indigent individual for services received."); 42 CFR 447.15 ("A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual."). Similar limitations frequently arise contractually.

[9] If by sending those invoices defendants had been able to successfully induce Casanova to make full payment short of litigation, then defendants would have successfully avoided a judicial determination of reasonableness in favor of their own effectively unilateral determination that their full charge constituted a reasonable charge.

August 10, 2016[10]—caused the claim to become untimely and the balance bill therefore to become uncollectable. Indeed, this points us to the real crux of the dispute in this case, i.e., whether the no-fault act's one-year-back rule, MCL 500.3145, applies. I conclude that it does.

MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance *benefits payable under this chapter* for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, *the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*. [Emphasis added.]

Defendants maintain that because their claim against Casanova is contractual and not brought under the no-fault act itself, the balance-bill charges that defendants seek to collect are not "benefits payable under this chapter." *Id*. I disagree. Initially, I find it impossible to reconcile defendants' contention with their own conduct and acknowledgments. That is, defendants acknowledge that Casanova was injured in a motor vehicle accident and that plaintiff insurers were obligated under the no-fault act to provide personal protection insurance benefits with respect to Casanova's receipt of medical treatment for those injuries. Defen-

[10] Defendants also sent an invoice to Casanova on a tenth occasion on December 14, 2016, after plaintiffs commenced this declaratory-judgment action.

dants further acknowledge that their charges for the medical treatment are subject to the reasonable-charge limitation of MCL 500.3157 and that plaintiff insurers paid defendants the amount that the insurers determined to be a reasonable charge. Consequently, defendants' position at bottom is that the paid portion of the charges ($1,076.14) constitutes "benefits payable under this chapter," MCL 500.3145(1), but that the unpaid portion of the charges ($782.86) does not. While clever, that argument strikes me as too cute by half. If accepted, it would enable defendants, while facially acknowledging that they are limited under the no-fault act to reasonable charges, to accept payment for a portion of the charges (i.e., the portion the insurers deemed to be reasonable), evade a judicial determination regarding whether the balance of the charges is reasonable (which, if found by a fact-finder to be reasonable, the insurer would remain obligated to pay), and yet insist that the patient pay the full balance as not subject to the reasonable-charge limitation of MCL 500.3157. The more one parses the contorted and circular logic of that proposition, the more obvious its ludicrousness appears. Simply put, the fact that healthcare providers do not possess a direct statutory cause of action against no-fault insurers, *Covenant*, 500 Mich at 217, does not mean that the balance bills they direct to their patients are for something other than "benefits payable under" the no-fault act. Those bills remain subject to the reasonable-charge limitation of the no-fault act, the insurers remain liable to the extent the charges are determined to be reasonable, and the amounts sought to be collected therefore constitute "benefits payable under" the no-fault act.[11]

[11] I also reject defendants' argument that the balance bills are not for "benefits payable under" the no-fault act because they are seeking payment for services rendered to Casanova rather than seeking benefits

Defendants further maintain in this regard that a healthcare provider's balance-bill claim is a "stand-alone contract action between the provider and its patient." Consequently, defendants argue, such a claim is subject to a six-year period of limitations. However, a person injured in a motor vehicle accident remains subject to the one-year-back rule of the no-fault act. Defendants effectively posit, therefore, that they are entitled to wait up to six years before bringing a balance-bill suit against Casanova—and that they therefore may wait up to six years before seeking a judicial determination of what constitutes a reasonable charge—even though, under the public policy set forth in the no-fault act, Casanova would by then have long ago been foreclosed from seeking coverage from his insurers for the services provided by defendants. Further, because the scope of an insurer's duty to defend is at least in part dependent on policy language, see *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000), it is at least possible that Casanova would at that juncture be precluded even from demanding that plaintiffs fulfill their obligation to defend him with respect to defendants' balance-bill claim.[12]

The public policy enacted by the Legislature in the form of the no-fault act affords to persons injured in a motor vehicle accident a right to personal protection

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payable *by Casanova*. The fact remains that the insurers remain liable for those charges to the extent they are judicially determined to be reasonable and, therefore, they are "benefits payable under" the act even though payable by the insurers rather than Casanova.

[12] Although not an issue in this case, if Casanova's claim for no-fault benefits had been assigned to an insurer through the Michigan Assigned Claims Plan, he would have had to commence "[a]n action to enforce rights to indemnity or reimbursement against a third party" within "the later of 2 years after the assignment of the claim to the insurer or 1 year after the date of the last payment to the claimant." MCL 500.3175(3).

insurance benefits and a right to have their insurer defend and indemnify them with respect to a claim for such benefits, subject to the limitations of the one-year-back rule. It would be anomalous indeed to allow a healthcare provider to divest an injured person of such rights, and thereby to subvert the public policy of this state, by failing to act in a manner that would allow the injured person to assert his or her rights in a timely fashion, all under the guise of a characterization of the provider's cause of action against the injured person as a "stand-alone contract action." I conclude that a healthcare provider's cause of action in such a circumstance cannot properly be characterized as a "stand-alone contract action." To the contrary, it is a contract-based claim that remains subject to public policy as expressed in the no-fault act. In other words, it is based on a contract, albeit in this case an implied one, that necessarily is subject to the public-policy limitations of the no-fault act, including the one-year-back rule of MCL 500.3145.

I find it unnecessary to definitively address the mechanism by which the contract in this case is subject to the public-policy limitations of the no-fault act because the result is the same in any event, i.e., defendants are precluded from collecting on their balance bill to Casanova under the circumstances of this case. In other words, it matters not for purposes of this case whether, for example, the contract in question should be reformed in accordance with the public policy of the no-fault act, see *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 257, 263; 819 NW2d 68 (2012) (noting the ability of a court to reform an insurance policy to be "compatible with the existing public policy as reflected in the no-fault act") (quotation marks and citation omitted), or whether the contract should be deemed, in whole or in part, unenforceable, see Restatement of

Contracts, 2d, § 178(1), p 6 ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."); 17A CJS Contracts, § 278, p 136 ("Contracts that violate public policy are unenforceable . . . ."); 17A Am Jur 2d, § 231, pp 239-240 ("[P]arties may not privately contract to contravene a state's public policy or to circumvent or disregard a statutory prohibition based on public policy.") (citations omitted); 17A CJS Contracts, § 271, pp 130-131 ("A court will not enforce a contract if it contravenes a statute. . . . A contract that is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable. A contract provision is unenforceable if it fails to comply with existing, governing statutory requirements by attempting to provide fewer rights than legally mandated by statute, as one cannot do indirectly that which the law does not allow to be done directly.") (citations and paragraph structure omitted).

It is indisputable that the no-fault act, as a statutory scheme enacted by our Legislature, reflects the public policy of this state. See *Rory v Continental Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005) ("In ascertaining the parameters of our public policy, we must look to 'policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.' ") (citation omitted).[13] Consequently, a contract (including a contract for the provision of

[13] I do not invoke public policy lightly, and I do so with full appreciation that "public policy 'is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must

healthcare services) may not contravene the public policy of this state as expressed in the no-fault act. If, or to the extent that, defendants' enforcement of their implied contract with Casanova would do so, the law will not permit it. For the reasons stated, I conclude that defendants' efforts to collect their balance bill from Casanova in a way that would circumvent the reasonable-charge limitation of MCL 500.3157—and in a way that would preclude Casanova from proceeding in a timely manner under MCL 500.3145 to invoke his insurers' duty to defend and indemnify him with respect to the balance bill—is not permitted under the public policy of the no-fault act. Defendants' claim against Casanova therefore fails.

Defendants additionally maintain that MCL 500.3145 does not apply because it only limits a "claimant" from recovering benefits for losses incurred more than one year before the commencement of the action,

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ultimately be clearly rooted in the law.' " *Rory*, 473 Mich at 471, citing *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002). The Court in *Terrien* further stated:

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law "is," not what it "ought" to be. [*Terrien*, 467 Mich at 66.]

Rather, "[i]n identifying the boundaries of public policy, . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Id*. at 66-67. Indisputably, the no-fault act represents public policy that is deeply rooted in the statutory law of this state.

and the Supreme Court in *Covenant*, 500 Mich at 217-218, declared that healthcare providers are not "claimants" under the no-fault act. However, *Covenant* merely held that healthcare providers do not have a statutory right to directly sue a no-fault insurer. In other words, providers lack standing to bring suit against an insurer under the no-fault act. The Court did not, however, assess whether a healthcare provider's balance-bill claim against its patient is subject to the limitations of the one-year-back rule. In my judgment, it is improper to lift the Supreme Court's language out of the context in which it was used, see *id*. at 217 n 39, and employ it as a weapon against the public policy clearly expressed by the Legislature. Instead, for the reasons stated, I conclude that the contract on which defendants base their claim against Casanova is subject to public policy as expressed in the no-fault act, including the limitations periods set forth in MCL 500.3157 and MCL 500.3145.

Effectively, this means that while defendants' claim against Casanova is based in contract, it is not subject to the usual six-year statutory period of limitations generally applicable to contract actions. Rather, MCL 500.3145 effectively superimposes on the contract (whether by reformation or by a limited-in-time enforceability) a shortened period of limitations as described in that section. Specifically, defendants were obliged to commence the action to recover the balance-bill amount within "1 year after the date of the accident,"[14] with certain exceptions. MCL 500.3145(1). Because plaintiff insurers made a partial payment on August 5, 2014, the time for filing suit was extended to "1 year after the most recent allowable expense, work loss or survivor's loss has been incurred." *Id*. The only

[14] The accident occurred on July 3, 2014.

allowable expenses were incurred on July 4, 2014. Consequently, MCL 500.3145 required that suit be filed by July 4, 2015. See *Douglas v Allstate Ins Co*, 492 Mich 241, 258-259; 821 NW2d 472 (2012).

In this case, however, defendants never commenced an action against Casanova to recover the balance-bill amount. Defendants' claim against Casanova is therefore time-barred. Moreover, MCL 500.3145(1) precludes claims "for any portion of the loss incurred more than 1 year before the date on which the action was commenced," MCL 500.3145(1), which in this case is the entirety of the balance bill.

For all these reasons, I conclude that although the trial court incorrectly determined that defendants' claim against Casanova was not based in contract, it reached the correct result, as does the majority. I therefore concur in the majority's determination to affirm the ruling of the trial court granting summary disposition in favor of plaintiffs.[15] I also concur in the majority's determination to reverse the trial court's award of reasonable attorney fees and costs to plaintiff insurers under MCL 445.257(2).

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[15] Contrary to defendants' assertions, this result does not leave healthcare providers generally without a remedy. Nor does it require that they accept insurers' unilateral determination of what constitutes a reasonable charge. To the contrary, providers need only (among other possible remedies) bring suit against their patients within the period of limitations afforded by MCL 500.3145, see *Douglas*, 492 Mich at 258-259, and seek a judicial determination of what constitutes a reasonable charge.

In re JACKSON (ON REMAND)

Docket No. 339724. Submitted December 13, 2018, at Lansing. Decided December 27, 2018, at 9:00 a.m.

Douglas C. Jackson filed an action in the Court of Appeals against Wayne Circuit Court Judge Vonda R. Evans, seeking a writ of superintending control directing the circuit court judge to decide plaintiff's motion for reconsideration in his underlying criminal case. The Court of Appeals administratively dismissed plaintiff's complaint under MCL 600.2963(8) because plaintiff, an indigent prisoner under the jurisdiction of the Department of Corrections, owed outstanding fees from a previous civil action in the Court of Appeals that was subject to MCL 600.2963. The Court of Appeals thereafter denied plaintiff's motion for reconsideration of the administrative dismissal order on the basis that plaintiff had failed to support his assertion that MCL 600.2963(8) was unconstitutional as applied to him. In lieu of granting plaintiff's application for leave to appeal, the Supreme Court vacated the Court of Appeals' orders and remanded the case for consideration of plaintiff's constitutional argument as on reconsideration granted. 503 Mich 851 (2018).

On remand, the Court of Appeals *held*:

1. MCL 600.2963(1) provides that if an indigent prisoner under the jurisdiction of the Department of Corrections files a civil action in a Michigan court or files an appeal in a civil action in a Michigan court, the amount or the reduced amount of filing fees and costs the indigent prisoner is required to pay is calculated in accordance with MCL 600.2963, taking into consideration the balance in the prisoner's institutional account; by its plain language, MCL 600.2963 applies only to civil actions filed by a prisoner. In other words, to pursue a civil action or file an appeal in the civil action, an indigent prisoner is responsible for paying or partially paying the filing fee and costs associated with the action or the appeal. In turn, MCL 600.2963(8) provides that a prisoner who has failed to pay outstanding fees and costs as required under MCL 600.2963 may not commence a new civil action or appeal until the outstanding fees and costs from the previous civil action have been paid. MCR 3.301(A)(1)(a) provides

that a civil action or appropriate motion in a pending action may be brought to obtain a writ of superintending control. Because a writ of superintending control is, by its terms, a civil action, the provisions of MCL 600.2963 relating to indigent prisoners and the payment of filing fees and costs apply.

2. Courts may not condition a right to appeal on the payment of filing fees or fees for the preparation of transcripts, particularly in criminal appeals; in that regard, it is unconstitutional to preclude a criminal defendant from filing a claim of appeal on the basis of an inability to pay fees. Although a writ of superintending control is a civil action, when a criminal defendant seeks such a writ in the Court of Appeals, it is part of the appellate process for the underlying criminal case for purposes of the federal constitutional right to have access to the appellate process in a criminal case. Because Michigan procedural law provides that an appeal of right and an application for leave to appeal first require a judgment or order of the lower court, a writ of superintending control directing the lower court to rule on a motion is a criminal defendant's only option when the lower court fails to so rule within a reasonable time. Although a writ of superintending control is a civil action, when an indigent criminal defendant seeks such a writ in a higher-level court, MCL 600.2963(8) does not bar the indigent criminal defendant from seeking the writ because it is unconstitutional to preclude a criminal defendant from filing a claim of appeal on the basis of an inability to pay fees; however, the other fee-related requirements of MCL 600.2963 may be applied to such a defendant because those requirements do not affect a criminal defendant's access to the higher-level court. In this case, MCL 600.2963(8) was unconstitutional as applied to defendant. Although the writ for superintending control was an original civil action, plaintiff sought relief in his underlying criminal case and plaintiff's inability to pay the outstanding fees and costs from a previous civil action could not be used to bar him from having access to relief in his criminal case.

Application of MCL 600.2963(8) to bar consideration of plaintiff's writ of superintending control unconstitutional, motion to waive fees denied, writ of superintending control returned to plaintiff, and plaintiff directed to refile the complaint with the understanding that he would be responsible for eventual payment of the appropriate overall filing fee for the instant case through deductions from future deposits into his prisoner account.

CRIMINAL LAW — WRITS OF SUPERINTENDING CONTROL — INDIGENT CRIMINAL DEFENDANTS — INABILITY TO PAY OUTSTANDING FEES AND COSTS IN PREVIOUS CIVIL ACTION.

MCL 600.2963(8) provides that a prisoner who has failed to pay outstanding fees and costs as required under MCL 600.2963 may not commence a new civil action or appeal until the outstanding fees and costs from the previous civil action have been paid; although a writ of superintending control is a civil action, when an indigent criminal defendant seeks such a writ in a higher-level court, MCL 600.2963(8) does not bar an indigent criminal defendant from seeking a writ of superintending control under MCR 3.301(A)(1)(a) because it is unconstitutional to preclude a criminal defendant from filing a claim of appeal on the basis of an inability to pay fees.

Douglas C. Jackson *in propria persona*.

Amici Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Gabriel E. Bedoya*), *Daniel S. Korobkin*, and *Michael J. Steinberg* for the American Civil Liberties Union Fund of Michigan.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *B. Eric Restuccia*, Chief Legal Counsel, for the Attorney General.

Before: O'BRIEN, P.J., and BOONSTRA and CAMERON, JJ.

PER CURIAM.

ON REMAND

This case is before us on remand from the Michigan Supreme Court for consideration of whether MCL 600.2963(8) is unconstitutional as it was applied to bar plaintiff's original complaint for superintending control. We conclude that it is. MCL 600.2963(8) cannot

constitutionally be applied to bar a complaint for superintending control over an underlying criminal case if the bar is based on outstanding fees owed by an indigent prisoner-plaintiff from an earlier case and the prisoner-plaintiff lacks funds to pay those outstanding fees.

This case is before this Court because plaintiff, Douglas C. Jackson, filed a complaint for superintending control in this Court against defendant circuit judge, alleging that defendant failed to rule on a motion for reconsideration of an order in plaintiff's underlying criminal case. In an administrative order entered under MCR 7.211(E), this Court dismissed plaintiff's complaint under MCL 600.2963(8) because plaintiff owed outstanding fees to this Court from a prior case he brought in this Court that was subject to MCL 600.2963. Under MCL 600.2963(1), the provisions of MCL 600.2963 apply to civil actions and appeals in civil actions filed by indigent prisoners of the Michigan Department of Corrections. As relevant here, MCL 600.2963 provides that a prisoner, subject to the provisions of MCL 600.2963, who pursues a civil case or appeal in a civil case, is responsible for possible payment of an initial partial filing fee and for eventual payment of the remainder of the filing fee and that the fees be deducted from his or her prisoner account. See MCL 600.2963(3) and (5). MCL 600.2963(8) then provides, "A prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid."

We initially denied plaintiff's motion for reconsideration of the administrative dismissal order, noting, in part, that plaintiff had not presented substantial legal argument to support a conclusion that application of

MCL 600.2963(8) to bar the present original action was unconstitutional. In lieu of granting plaintiff's application for leave to appeal, the Michigan Supreme Court vacated this Court's orders dismissing the case and denying reconsideration of that dismissal and remanded the case to this Court "as on reconsideration granted, for plenary consideration of the plaintiff's argument that MCL 600.2963(8), as applied to his complaint for superintending control, is unconstitutional." *In re Jackson*, 503 Mich 851 (2018). Therefore, at this point, the merits of plaintiff's complaint for superintending control are not before this panel. Rather, the question is whether it is constitutional to bar plaintiff from even pursuing the complaint for superintending control in this Court under MCL 600.2963(8).

Plaintiff has submitted a supplemental brief arguing that he should not be barred by MCL 600.2963(8) from proceeding. At our invitation, the Attorney General and the American Civil Liberties Union Fund of Michigan (the ACLU) have also filed amicus curiae briefs as to the present issue.[1]

Plaintiff and the Attorney General present substantially similar arguments that would effectively avoid the constitutional issue before us by construing MCL 600.2963 to be inapplicable to a complaint for superintending control that relates to an underlying criminal case. They argue that such a complaint should not be considered a civil action but that it is, instead, effectively part of the underlying criminal case.

We must reject this position. When interpreting a statute, unambiguous statutory language must be applied as written. *Ronnisch Constr Group, Inc v Lofts on*

[1] We thank the Attorney General and the ACLU for accepting our invitation to file amicus curiae briefs to seek to aid the Court in deciding the present question.

the Nine, LLC, 499 Mich 544, 552; 886 NW2d 113 (2016). Court rules are interpreted "using the same principles that govern the interpretation of statutes." *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). By its plain language, MCL 600.2963(1) applies the provisions of MCL 600.2963 to a "civil action" filed by a prisoner of the Michigan Department of Corrections; and by its plain language, MCL 600.2963(8) bars a prisoner who has failed to pay outstanding fees in a prior case subject to MCL 600.2963 from commencing "a new civil action or appeal" until the outstanding fees have been paid. Under MCR 3.301(A)(1)(a), a "civil action or appropriate motion in a pending action" may be brought to obtain superintending control. Plaintiff initiated this case by filing a complaint for superintending control. Under the plain language of MCR 3.301(A)(1)(a), that filing constituted the filing of a civil action. So under the unambiguous language of MCL 600.2963 and MCR 3.301(A)(1)(a), the provisions of MCL 600.2963 apply to this case as a matter of Michigan procedural and statutory law.[2] Also, MCR 3.301(A)(1)(a), with its definition of an original action for superintending control as a civil action, was adopted before the enactment of MCL 600.2963. Thus, the Legislature is presumed to have known that the provisions of MCL 600.2963 would apply to a civil action for superintending control, even if the complaint was for superintending control of an underlying criminal case. See *People v Clark*, 315 Mich App 219, 232; 888 NW2d 309 (2016) (explaining that the Legislature

[2] The Attorney General refers to MCR 6.001(D) in support of its position, but we conclude that provision is inapposite. Under MCR 6.001(D), the rules of civil procedure generally apply to criminal cases. But the general applicability of civil-procedure rules to criminal cases is immaterial to the status of the present case as a civil case under Michigan procedural law.

is presumed aware of, and to legislate in harmony with, existing laws when enacting new laws).

We now turn to the issue our Supreme Court's remand order directs this Court to decide: whether application of MCL 600.2963(8) to bar plaintiff's complaint for superintending control is unconstitutional. In a line of cases beginning with *Griffin v Illinois*, 351 US 12; 76 S Ct 585; 100 L Ed 891 (1956), the United States Supreme Court has considered issues involving the constitutionality of legal rules that bar an indigent person from seeking review in a higher court because of an inability to pay filing fees or fees for the preparation of transcripts, particularly in the context of criminal appeals. That Court has explained that these cases "reflect both equal protection and due process concerns" under the Fourteenth Amendment. *MLB v SLJ*, 519 US 102, 120; 117 S Ct 555; 136 L Ed 2d 473 (1996). "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs." *Id*.

Although *MLB* involved an indigent person who was unable to pay record-preparation fees—which were required under Mississippi law before she could appeal the order terminating her parental rights—we find *MLB* instructive in its discussion of the present state of federal constitutional law in this area. *MLB* explains that the Court's earlier opinion in *Mayer v Chicago*, 404 US 189; 92 S Ct 410; 30 L Ed 2d 372 (1971), emphasized that *Griffin*'s rule was a "flat prohibition" in criminal cases against making access to "appellate processes" turn on the ability to pay. *MLB*, 519 US at 112.[3] In

[3] The *MLB* Court contrasted the "flat prohibition" of "bolted doors"—i.e., denial of access to a court because of an inability to pay fees—to the less-encompassing right to counsel at state expense. *MLB*, 519 US at 112-113.

discussing the right to have access to the courts in certain matters under the line of cases beginning with *Griffin*, the *MLB* Court observed, "A 'precise rationale' has not been composed because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' " *Id*. at 120 (citations omitted). We recognize that the matter before us cannot be resolved by "pigeonhole analysis" merely because plaintiff's action for superintending control is classified by Michigan procedural law as a civil action, i.e., technically a new civil suit by plaintiff against defendant. Nevertheless, we conclude that this case is an "appellate process" for the underlying criminal case for purposes of the federal constitutional right to access the appellate process in a criminal case.

Formalistic procedural labels aside, what plaintiff seeks in this superintending-control action is review by this Court, as the court immediately above the circuit court, of defendant circuit judge's alleged failure to rule on a motion for reconsideration in plaintiff's criminal case. Plaintiff asks this Court to direct defendant circuit judge to rule on that motion. This appears to be plaintiff's only option. Under Michigan procedural law, plaintiff has no means to appeal defendant circuit judge's failure to rule on a motion within a reasonable time because both an appeal of right and an application for leave to appeal first require a judgment or order of a lower court. See MCR 7.203(A) and (B). When a circuit court fails to rule on a motion, no such judgment or order is entered. But if a circuit court issued an order denying a motion in a criminal case, the criminal defendant would be able to file either a claim of appeal or an application for leave to appeal that order. See MCR 7.204; MCR 7.205. MCL 600.2963(8) would not apply to the filing of such an appeal in a criminal case. Indeed, as *MLB* makes

apparent, it would be unconstitutional, on the basis of an inability to pay fees, to preclude an indigent criminal defendant from filing a claim of appeal. Yet if a circuit court denied a motion in a criminal case *sub silentio* by perpetually failing to rule on the motion, MCL 600.2963(8) would, by its terms, bar an indigent criminal defendant from filing a complaint for superintending control if he or she owed outstanding fees to this Court for a prior civil case, even if the indigent criminal defendant had no means to pay those outstanding fees. This is an unwarranted distinction for purposes of the federal constitutional right of access to appellate review under *Griffin* and its progeny because, in either event, what is being sought is review by this Court, as the next-higher-level court, of an aspect of the criminal case. Thus, we recognize that this case is criminal in nature for purposes of the federal constitutional right of access to the courts in such cases. And given that function, a complaint for superintending control over an underlying criminal case must reasonably be recognized as an "appellate process" within the meaning of *MLB* and *Mayer*, even though it is an original civil action, and not formally an appeal, under Michigan procedural law. We therefore hold that MCL 600.2963(8) is unconstitutional as applied when it is used to bar a complaint for superintending control seeking relief in an underlying criminal case where the indigent plaintiff is unable to pay the outstanding fees owed to this Court for a prior case subject to MCL 600.2963.

Review of plaintiff's most recent prisoner account statement shows plaintiff's account to have a zero current spendable balance and, for the previous 12 months, a zero average monthly deposit and a negative average monthly balance. Thus, it appears manifest that plaintiff is indigent and cannot pay the outstand-

ing fees owed this Court for his prior case subject to MCL 600.2963(8). On the basis of the principles just articulated, plaintiff must be allowed to proceed with the present superintending-control action despite the outstanding fees from the prior case.

In its amicus curiae brief, the ACLU argues that application of MCL 600.2963(8) would be unconstitutional whenever it would bar an indigent prisoner from proceeding with a civil appeal or original action because of outstanding fees owed for an earlier civil case subject to MCL 600.2963. We decline to unnecessarily reach those arguments. We do note that in *MLB* the United States Supreme Court referred to its earlier opinion in *United States v Kras*, 409 US 434; 93 S Ct 631; 34 L Ed 2d 626 (1973), as clarifying that "a constitutional requirement to waive court fees in civil cases is the exception, not the general rule." *MLB*, 519 US at 114. We therefore emphasize that our holding is rooted in the heightened protection given to criminal defendants for access to the courts in criminal cases for purposes of securing the federal constitutional right to the appellate process. We leave as questions for another day consideration of issues related to the treatment of indigent prisoners by MCL 600.2963(8) in a civil case that does not seek relief related to an underlying criminal case and that is not otherwise provided heightened protection for purposes of access to the courts (like termination of parental rights matters as considered in *MLB*) and whether application of MCL 600.2963(8) only to prisoners and not to indigent nonprisoners raises equal-protection concerns.

In light of our holding that it was unconstitutional to bar this superintending-control action from consideration on the merits, we simultaneously with the issuance of this opinion enter an order allowing this case to

proceed under MCL 600.2963. Consistent with the remaining provisions of MCL 600.2963 and this Court's customary practices for civil actions filed by prisoners of the Michigan Department of Corrections, that order formally denies plaintiff's motion to waive fees and directs the clerk's office to return his complaint for superintending control but allows him to proceed with this case by refiling the returned pleadings within 21 days after the date of that order (and this opinion).[4] If plaintiff does so, he will be responsible for eventual payment of the appropriate overall filing fee for the present case through deductions from future deposits to his prisoner account, and the case will be decided on the merits. If plaintiff does not refile the returned pleadings, this case will be closed out by the clerk's office as if it had never been filed, consistently with MCL 600.2963(1).

We note that there is no inconsistency between our holding that MCL 600.2963(8) cannot constitutionally be applied under the circumstances here and application of the other fee-related requirements of MCL 600.2963. If plaintiff refiles his pleadings, this case will proceed to consideration on the merits regardless of whether the filing fee for the present case is ever completely collected from possible future deposits to plaintiff's prisoner account. It follows that imposing the requirement for potential future collection of the filing fee does not prevent plaintiff from having access to this Court on the basis of his present indigence. Also, our conclusion that this case must be recognized as criminal in nature for purposes of the federal constitu-

[4] Because of the zero current balance, zero average monthly deposit for the prior 12 months, and negative average monthly balance for the prior 12 months shown in plaintiff's account statement, plaintiff is not responsible for an initial partial filing fee under MCL 600.2963(3).

tional right of access to the courts in such cases does not change its classification as an original civil action subject to the fee-related requirements of MCL 600.2963 (apart from an unconstitutional application of MCL 600.2963(8)) by Michigan procedural and statutory law.

This case shall proceed in this Court consistent with this opinion.

O'BRIEN, P.J., and BOONSTRA and CAMERON, JJ., concurred.

VanALSTINE v LAND O'LAKES PURINA FEEDS LLC

Docket Nos. 340150 and 342990. Submitted November 6, 2018, at Lansing. Decided December 27, 2018, at 9:05 a.m. Leave to appeal sought in Docket No. 340150, and leave denied 504 Mich 957 (2019).

In Docket No. 340150, Ron and Joan VanAlstine brought an action in the Clinton Circuit Court against Land O'Lakes Purina Feeds LLC (defendant) and Diversified Farms, LLC (Diversified), alleging that defendant's animal-feed products caused iodine toxicity in plaintiffs' herd of cattle and, as a result, that defendant breached the implied warranties of merchantability and fitness for a particular purpose under Michigan's Uniform Commercial Code (UCC), MCL 440.1101 *et seq*. Defendant, a Minnesota corporation, manufactured the products, and Diversified was the distributor of those products. In July 2018, Diversified executed a Credit Application and Agreement (the Credit Agreement) with defendant that included a disclaimer of warranties (¶ 17) and a remedy-limiting provision (¶ 18). Plaintiffs were not parties to the Credit Agreement. In early 2013, plaintiffs entered into an oral contract with Diversified in which Diversified agreed to supply defendant's products to plaintiffs. A few months after entering into the oral contract, plaintiffs noticed that their herd of cattle showed signs of sickness, and it was ultimately determined that the herd suffered from iodine toxicity. Plaintiffs performed tests of the feed and concluded that defendant's products sickened the herd. Defendant disagreed, arguing that the iodine toxicity came from another source. Defendant moved for summary disposition, arguing that it effectively disclaimed the implied warranties under ¶¶ 17 and 18 of the Credit Agreement. Plaintiffs argued that the remedy limitation in ¶ 18 failed of its essential purpose, thereby invalidating the disclaimer of implied warranties in ¶ 17 and allowing them to recover under the standard warranty provisions of the UCC. The court, Randy L. Tahvonen, J., disagreed, concluding that a failure of a remedy does not revive effectively disclaimed implied warranties. Accordingly, the court granted defendant's motion.

In Docket No. 342990, plaintiffs objected to the court's order taxing costs, arguing that defendant's requested costs were not

authorized by statute. Defendant filed an amended taxation of costs. The court concluded that the amended taxation was authorized and taxed costs against plaintiffs. Plaintiffs appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Courts will not defer to the parties' choice of law if (1) the chosen state has no substantial relationship to the parties or the transaction, (2) there is no reasonable basis for choosing that state's law, or (3) when applying the chosen state's law would be contrary to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and whose law would be applicable in the absence of an effective choice of law by the parties. In this case, the Credit Agreement, which was executed by defendant and Diversified, contained a choice-of-law provision designating Minnesota law as the applicable state law. Diversified was dismissed from the lawsuit, however, and plaintiffs were not parties to the Credit Agreement. Moreover, at no time before this appeal did plaintiffs argue that Minnesota law should apply to this case; it was only after the trial court granted defendant's motion for summary disposition that plaintiffs argued that Michigan law was inapplicable. Because Michigan law had been applied from the outset of the case and plaintiffs did not provide support for their argument that Minnesota law should apply, Michigan law was applied.

2. Plaintiffs did not assert a claim of breach of an express warranty in their complaint, did not otherwise raise that issue in the trial court, and did not include that issue in their statement of questions presented on appeal; accordingly, this issue was not addressed on appeal.

3. Michigan's version of Article 2 of the UCC, MCL 440.2101 *et seq*., governs transactions involving the sale of goods. MCL 440.2314 and MCL 440.2315 provide that every contract for the sale of goods under Article 2 of the UCC includes implied warranties of merchantability and fitness for a particular purpose. Importantly, an indirect purchaser can acquire no greater implied-warranty rights from the manufacturer than those originally bargained for by the direct purchaser. MCL 440.2316 provides that a seller may disclaim either implied warranty as long as certain statutory requirements are met: to disclaim the implied warranty of merchantability, the language of the disclaimer must mention "merchantability" and be "conspicuous," and to disclaim the im-

plied warranty of fitness for a particular purpose, "the exclusion must be by a writing and conspicuous." In this case, ¶ 17 was entitled "**DISCLAIMER OF WARRANTIES**," and the text of the paragraph appeared in all capital letters. The first sentence contained the terms "merchantability" and "fitness for a particular purpose." The second sentence made clear that there were "no . . . implied warranties." Therefore, the appropriate terms were used, the operative language was clear and in writing, and the format made the disclaimers conspicuous. Paragraph 17 met the disclaimer requirements of MCL 440.2316.

4. A warranty fails of its essential purpose when unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agreed, in which event the buyer is entitled to seek remedies under the standard UCC warranty provisions. In this case, plaintiffs argued that ¶ 18—which promised replacement of any products sold or services provided—failed of its essential purpose because the feed supplements manufactured by defendant were not subject to replacement given that the cattle consumed the products soon after delivery and the products damaged the cattle upon consumption. Thus, plaintiffs argued that because ¶ 18 failed of its essential purpose, the disclaimer of implied warranties in ¶ 17 was invalidated and allowed them to recover under the standard warranty provisions of the UCC. This argument was without merit. Defendant effectively disclaimed any implied warranty in the Credit Agreement, and once an implied warranty is effectively disclaimed, there can be no breach of that disclaimed warranty, regardless of whether the remedy for an express or other undisclaimed implied warranty is arguably deficient. This conclusion was supported by comparable holdings in other jurisdictions. Finally, plaintiffs' reliance on *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105 (1986), and *Severn v Sperry Corp*, 212 Mich App 406 (1995), was misplaced because those two cases involved the question whether an express warranty covering defective parts with a remedy of repair or replace failed of its essential purpose; neither decision held that a disclaimed implied warranty could be revived, and thus both decisions were inapposite to plaintiffs' claims here. Accordingly, the trial court properly granted summary disposition in favor of defendant.

5. Under MCL 600.2552(1), a witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day. Defendant had originally requested $12.00 each for four depositions, but, after plaintiffs pointed out that each of the four depositions only

lasted half of a day, defendant agreed that the correct amount was $6.00 for each deposition. The trial court, however, did not adjust the amount to the half-day fee when it granted defendant's motion for costs. Thus, remand was necessary to correct the award.

6. Under MCL 600.2549, to tax costs for the taking of a deposition, the deposition must be (1) filed with any clerk's office and (2) read into evidence at trial or when damages were assessed. In this case, although defendant asserted that the deposition transcripts were filed in the clerk's office, a review of the register of actions did not support this assertion. Furthermore, the record did not indicate that the depositions were read into evidence in the trial court. Therefore, defendant was not entitled to any taxable costs for the taking of depositions.

7. MCL 600.2559(1) authorizes the fees allowed for process or papers served out of a court. Under this section, defendant requested $420.17 to pay for certified mail and federal express fees to send documents to file with the clerk of the court. Because these documents were sent to the court, however, they did not qualify as "process or papers served out of a court." Accordingly, defendant was not entitled to the costs related to those mailings. Defendant additionally requested $392.03 for mileage and travel under MCL 600.2559, arguing that the heading of that section indicated that mileage could be taxed. However, the heading is not part of the statute and cannot be used to construe the statute, and MCL 600.2559(1) makes clear that any mileage taxed under that subsection must be related to out-of-court service of process or papers. Defendant did not show that these fees were related to out-of-court service, and therefore the taxation of these fees was not authorized by statute.

Trial court order granting summary disposition in Docket No. 340150 affirmed. Trial court order taxing costs in Docket No. 342990 vacated to the extent it allowed the taxation of improper costs. Docket No. 342990 remanded to the trial court for modification of the order taxing costs by decreasing the amount of taxable costs from $3,331.20 to $178.43.

SALES — UNIFORM COMMERCIAL CODE — IMPLIED WARRANTIES — DISCLAIMER OF IMPLIED WARRANTIES.

Michigan's version of Article 2 of the Uniform Commercial Code (UCC), MCL 440.2101 *et seq*., governs transactions involving the sale of goods; MCL 440.2314 and MCL 440.2315 provide that every contract for the sale of goods under Article 2 of the UCC includes implied warranties of merchantability and fitness for a

particular purpose; MCL 440.2316 provides that a seller may disclaim either implied warranty as long as certain statutory requirements are met; once an implied warranty is effectively disclaimed, it cannot be revived by the inadequacy of some other warranty's remedy.

Bosch Killman VanderWal, PC (by *Kurt R. Killman*) for plaintiffs.

Honigman Miller Schwartz & Cohn LLP (by *Christopher E. Tracy*) and *Jonathan C. Miesen* for Land O'Lakes Purina Feeds LLC.

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

SWARTZLE, J. An implied warranty, once disclaimed, cannot be revived by the inadequacy of an express warranty's remedy. This rule of law is fatal to plaintiffs' claims of breach of implied warranty under Michigan's version of the Uniform Commercial Code, and thus we affirm summary disposition against plaintiffs. On the matter of taxable costs, we vacate in part the trial court's order taxing costs and remand for correction.

I. BACKGROUND

Plaintiffs operate a dairy farm in Eaton County. Land O'Lakes Purina Feeds LLC (defendant) is a Minnesota corporation that manufactures and distributes animal feed and related products. Diversified Farms, LLC (Diversified) is a distributor of those products in Michigan. In July 2008, Diversified executed a Credit Application and Agreement (the Credit Agreement) with defendant that included a disclaimer of warranties and a remedy-limiting provision. Plaintiffs were not parties to the Credit Agreement.

In early 2013, plaintiffs entered into an oral contract with Diversified in which Diversified agreed to supply defendant's products to plaintiffs. The two products at issue are a dairy-protein supplement and a dry-cow supplement, which are concentrates that are mixed with grain, haylage, and silage before being fed to dairy cattle. Plaintiffs also purchased from Diversified a salt-and-mineral supplement commonly referred to as "SE-90," which was not defendant's product. SE-90 was provided to the herd on a "free choice" basis, meaning that the cattle could eat as much or as little of it as they wanted.

Plaintiffs began to notice that the herd showed signs of sickness a few months after entering the oral contract with Diversified. It was ultimately determined that the herd suffered from iodine toxicity. After performing tests of the feed, plaintiffs concluded that defendant's products sickened the herd. Defendant disagreed, arguing that the iodine toxicity came from another source, likely the SE-90.

Plaintiffs sued, alleging that defendant's products caused iodine toxicity in plaintiffs' herd and, as a result, defendant breached the implied warranties of merchantability and fitness for a particular purpose under the Uniform Commercial Code (UCC). Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it effectively disclaimed the implied warranties under the following paragraphs of the Credit Agreement:

> **17. DISCLAIMER OF WARRANTIES.** SUPPLIER EXCLUDES AND DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO ANY GOODS SOLD TO APPLICANT. THERE ARE NO EXPRESS OR IMPLIED WARRANTIES, WHICH EXTEND

> BEYOND THE WARRANTIES EXPRESSLY STATED ON THE FACE OF ANY SUCH PRODUCT.
>
> **18. EXCLUSIVE REMEDY.** Applicant's sole and exclusive remedy for claims made against Supplier (including, without limitation, claims for breach of contract, breach of warranty, negligence, or strict liability) are limited to the replacement of any products sold or services provided. Supplier is not responsible and Applicant expressly agrees to hold Supplier harmless for any special, indirect, consequential, exemplary, incidental, or additional damages.

The Credit Agreement also contained a choice-of-law provision designating Minnesota law as the applicable state law.

Applying Michigan's version of the UCC, the trial court found that the disclaimer of implied warranties in paragraph 17 was effective because it adhered to the statutory requirements. Plaintiffs maintained that the remedy limitation in paragraph 18 failed of its essential purpose, thereby invalidating the disclaimer found in paragraph 17 and allowing them to recover under the standard warranty provisions of the UCC. The trial court disagreed, concluding that a failure of a remedy does not revive effectively disclaimed implied warranties. Accordingly, the trial court granted defendant's motion for summary disposition.

After the trial court granted summary disposition, defendant submitted a proposed taxation of costs, requesting $4,982.26. Plaintiffs filed an objection, arguing that the costs requested were not authorized by statute. Defendant filed an amended taxation of costs and sought a revised amount of $3,331.20. Concluding that the amended taxation was authorized and not extraordinary, the trial court taxed costs against plaintiffs.

Plaintiffs appealed both rulings of the trial court.

II. ANALYSIS

A. STANDARD OF REVIEW

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim and is appropriately granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *TOMRA of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 294; 926 NW2d 259 (2018). We review de novo issues of statutory and contractual interpretation. *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 632; 774 NW2d 332 (2009).

We review a trial court's ruling on a motion to tax costs for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007). "An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes." *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008). "[W]hether a particular expense is taxable as a cost is a question of law" that this Court reviews de novo. *Id*. at 670.

B. CHOICE OF LAW

In a footnote in their appellate brief, plaintiffs argue that this Court should apply Minnesota law to this dispute because of the choice-of-law provision in the Credit Agreement. "When determining the applicable law, the expectations of the parties must be balanced with the interests of the states." *Hudson v Mathers*, 283 Mich App 91, 96; 770 NW2d 883 (2009). "The parties' choice of law should be applied if the issue is

one the parties could have resolved by an express contractual provision." *Id*. This Court, however, will not defer to the parties' choice of law if "(1) the chosen state has no substantial relationship to the parties or the transaction," "(2) there is no reasonable basis for choosing that state's law," or (3) when applying the chosen state's law "would be contrary to the fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and whose law would be applicable in the absence of an effective choice of law by the parties." *Id*. at 96-97.

The Credit Agreement was executed by defendant, a Minnesota corporation, and Diversified, a Michigan limited-liability company. If defendant and Diversified were the only parties to this dispute, then it appears that there would be little question that Minnesota law would apply per the Credit Agreement's choice-of-law provision. Yet, Diversified was dismissed from the lawsuit, and plaintiffs were not parties to the Credit Agreement.

At no time before this appeal have plaintiffs argued that Minnesota law applies to this case. Rather, only after the trial court granted defendant's motion for summary disposition—applying Michigan law—did plaintiffs argue that this state's law was inapplicable. On appeal, plaintiffs have not provided any argument as to why the choice-of-law provision should apply to them despite not being a party to the Credit Agreement. Moreover, plaintiffs do not argue that the choice between Michigan or Minnesota law is outcome-determinative, and, indeed, the two states have both adopted the same model provisions of the UCC at issue here. Compare MCL 440.2316 with Minn Stat 336.2-316. Thus, because Michigan law has been applied

from the outset and plaintiffs have not provided any support for their argument that Minnesota law should apply, we apply Michigan law to this dispute. *Hudson*, 283 Mich App at 97.

C. EXPRESS WARRANTY

Moving to the merits of plaintiffs' claims, plaintiffs first argue that the trial court erred by granting summary disposition because the record shows that defendant breached an express warranty. Plaintiffs did not, however, assert a claim of breach of an express warranty in their complaint, nor did they otherwise raise the issue before the trial court. On appeal, plaintiffs did not include the issue in their statement of questions presented. Therefore, we decline to address the issue in the first instance on appeal. *Orion Twp v State Tax Comm*, 195 Mich App 13, 18; 489 NW2d 120 (1992).

D. IMPLIED WARRANTIES

Plaintiffs' primary argument on appeal is that the limited remedy in paragraph 18 of the Credit Agreement failed of its essential purpose and, as a result, the disclaimers of implied warranties in paragraph 17 were ineffective. Michigan's version of Article 2 of the UCC, MCL 440.2101 *et seq*., governs the transactions of the sale of goods. "Every contract for the sale of goods under Article 2 of the [UCC] includes implied warranties of merchantability and fitness for a particular purpose." *Lumber Mut Ins Co v Clarklift of Detroit, Inc*, 224 Mich App 737, 739; 569 NW2d 681 (1997), citing MCL 440.2314 and MCL 440.2315. "The warranty of merchantability requires that the goods sold be of average quality within the industry. A warranty of fitness for a particular purpose requires that the

goods sold be fit for the purpose for which they are intended." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 316; 696 NW2d 49 (2005) (cleaned up). A seller may, however, disclaim either implied warranty, provided that certain statutory requirements are met. MCL 440.2316. Whether a warranty was effectively disclaimed is a question of law for this Court. *Lumber Mut Ins*, 224 Mich App at 742.

To begin, the parties do not dispute that the disclaimers of implied warranties in paragraph 17 are binding on plaintiffs, even though plaintiffs were not parties to the Credit Agreement. An indirect purchaser, such as plaintiffs here, can acquire no greater implied-warranty rights from the manufacturer than those originally bargained-for by the direct purchaser. While the indirect purchaser could bargain for additional implied warranties from the direct purchaser, those additional rights would have to arise from an agreement between the two purchasers. If the indirect purchaser seeks to enforce the manufacturer's implied warranty, then the indirect purchaser is limited to what the manufacturer and direct purchaser negotiated. See *Heritage Resources*, 284 Mich App at 641 & n 15.

Nor is there any real question that the language of paragraph 17 satisfies the statutory requirements for disclaiming the implied warranties of merchantability and fitness for a particular purpose. To disclaim the implied warranty of merchantability, the language of the disclaimer must mention "merchantability" and be "conspicuous." MCL 440.2316(2). To disclaim the implied warranty of fitness for a particular purpose, "the exclusion must be by a writing and conspicuous." *Id*.

The title of paragraph 17 is "**DISCLAIMER OF WARRANTIES**" and the text of the paragraph is in

ALL-CAPS. The first sentence disclaims in plain English the implied warranty of "merchantability" and "fitness for a particular purpose," using those specific terms. The second sentence makes clear that there are "no . . . implied warranties." The appropriate terms are used, the operative language is clear and in writing, and the format makes the disclaimers conspicuous. Thus, paragraph 17 adheres to the disclaimer requirements of MCL 440.2316(2). Given this, a claim of breach of implied warranty would appear to be fatally deficient.

To counter this conclusion, plaintiffs argue that the implied warranties disclaimed in paragraph 17 were revived by operation of law because the express warranty and remedy provided in paragraph 18 failed of their essential purpose. "[A] warranty fails of its essential purpose where unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agreed, in which event the buyer is entitled to seek remedies under the standard UCC warranty provisions." *Severn v Sperry Corp*, 212 Mich App 406, 413-414; 538 NW2d 50 (1995).

Plaintiffs explain that the feed supplements manufactured by defendant were not realistically subject to replacement because the products were consumed soon after delivery and the products damaged the herd upon consumption. Therefore, plaintiffs conclude that the "limited express warranty" remedy in paragraph 18—the promised replacement of any products sold or services provided—failed of its essential purpose. Plaintiffs argue that this failure revived the otherwise disclaimed implied warranties in paragraph 17.

Plaintiffs' argument is without merit. As explained earlier, plaintiffs did not make a breach of express warranty claim below, nor did they preserve the issue

for appeal. Instead, they claimed breaches of implied warranties of merchantability and fitness. But, to state the obvious, to succeed on a claim of breach of implied warranty, a party must, among other things, be able to point to an actual implied warranty. And here, defendant effectively disclaimed any implied warranty in the Credit Agreement. As a matter of logic, once an implied warranty is effectively disclaimed, there can be no breach of that disclaimed warranty, regardless of whether the remedy for an express or other undisclaimed implied warranty is arguably deficient. See MCL 440.2316; UCC § 2-316, official comment 2 (2017) ("If no warranty exists, there is of course no problem of limiting remedies for breach of warranty."). Simply put, once an implied warranty is effectively disclaimed, it cannot be revived by the inadequacy of some other warranty's remedy.

When interpreting this state's UCC, we may gain guidance from decisions of other jurisdictions interpreting similar model provisions. *Heritage Resources*, 284 Mich App at 632. Our conclusion is supported by comparable holdings in other jurisdictions. See, e.g., *FMC Fin Corp v Murphree*, 632 F2d 413, 420 (CA 5, 1980) ("If there is no warranty because of a valid disclaimer, there is no problem of limiting warranty breach remedies."); *Ritchie Enterprises v Honeywell Bull, Inc*, 730 F Supp 1041, 1047-1048 (D Kan, 1990) ("Despite any argument that the limited remedy failed of its essential purpose, plaintiff is bound by the written exclusion of the express and implied warranties, and its only warranty claim is based on the express warranty" in the agreement.); *Earl Brace & Sons v Ciba-Geigy Corp*, 708 F Supp 708, 711 (WD Pa, 1989) ("There can be no breach where the warranty has been disclaimed . . . and no consequential damages where there is no breach."); *RJ Meyers Co v Reinke Mfg*

Co, Inc, 885 NW2d 429, 439 (Iowa App, 2016) ("[T]he failure of the repair and replace remedy for breach of the express warranty does not revive otherwise disclaimed implied warranties.").

In support of their position, plaintiffs rely on two decisions of this Court, *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105; 394 NW2d 17 (1986), and *Severn*, 212 Mich App 406. Yet, both cases involved the question whether an express warranty covering defective parts with a remedy of repair or replace failed of its essential purpose. Neither decision held that a disclaimed implied warranty could be revived, and thus both decisions are inapposite to plaintiffs' claims here.

Accordingly, we affirm the trial court's grant of summary disposition to defendant.

E. TAXABLE COSTS

Plaintiffs next argue that the trial court erred by allowing defendant to tax costs that were not authorized by the statute. MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." "The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Guerrero*, 280 Mich App at 670.

Plaintiffs first object to the amount authorized for witness fees. Under MCL 600.2552(1), "[a] witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day." Defendant had originally requested $12.00 each for four depositions, but, after plaintiffs pointed out that each of the four depositions

only lasted half of a day, defendant agreed that the correct amount was $6.00 for each deposition. The trial court, however, did not adjust the amount to the half-day fee when it granted defendant's motion for costs. Thus, remand is necessary to correct the award.

Next, plaintiffs object to the costs allowed for the taking of depositions. Defendant requested $2,316.37 for the taking of depositions. Plaintiffs disputed this amount, arguing that there should be no taxable costs for the taking of depositions because the depositions were not read into evidence and were not filed with the clerk. The trial court disagreed and granted the request in full.

To tax costs for the taking of a deposition, the deposition must be (1) filed with any clerk's office, and (2) read into evidence at trial or when damages were assessed. MCL 600.2549. Although defendant asserts that the deposition transcripts were filed in the clerk's office, a review of the register of actions does not support this assertion. Furthermore, the record does not indicate that the depositions were read into evidence in the trial court. Thus, defendant was not entitled to any taxable costs for the taking of depositions.

Finally, plaintiffs argue that costs for service fees, mileage, and travel were improperly taxed under MCL 600.2559. Under this section, defendant requested $420.37 for mail fees and the trial court granted the request in full. The record indicates that defendant requested the amount to pay for certified mail and federal express fees to send documents to file with the clerk of the court. Because these documents were sent to the court, they do not qualify as "process or papers served *out of a court*." MCL 600.2559(1) (emphasis added). Thus, defendant has not shown that it is entitled to the costs related to these mailings.

The trial court also granted defendant's request for $392.03 for mileage and travel under this section for defense counsel's travel to certain depositions, hearings, and court proceedings. Nonetheless, this type of mileage and travel is not covered by MCL 600.2559. Defendant argues that the heading of MCL 600.2559 indicates that mileage may be taxed under this section. The catch-line heading for this section on the Michigan Legislature's website reads: "Fees for service of process; fee for process with incorrect address; mileage; fee for advertising; liability; charging fee in excess of law; tax costs; 'order for the seizure of property' defined." (Emphasis omitted.) This catch-line heading was added by the Legislative Service Bureau to its published version of the statute, and it was not part of the statute actually enacted by the Legislature. Compare 2018 PA 261 with MCL 600.2559 (Legislative Service Bureau, Michigan Compiled Laws, Section 600.2559 <https://perma.cc/4BC3-VDG9> (accessed December 27, 2018)). Therefore, there is no reason to give it any weight in construing what the Legislature meant when it enacted the statute. Moreover, the Legislature has made it clear that even catch-line headings included in the statute as-enacted must be ignored for purposes of construing that statute. See MCL 8.4b. To the extent that mileage is authorized in some of the subsections of MCL 600.2559, Subsection 1 makes clear that any mileage taxed under MCL 600.2559 must be related to out-of-court service of process or papers, and defendant has not shown that these fees were related to this type of service. Thus, because defendant has not shown that the mileage and travel fees were authorized by statute, defendant has not shown that the taxation of $392.03 was authorized by statute.

III. CONCLUSION

In Docket No. 340150, we affirm the trial court's order granting summary disposition. In Docket No. 342990, we vacate the trial court's order taxing costs to the extent it allowed the taxation of improper expenses. On remand, the trial court shall modify the order taxing costs by decreasing the amount of taxable costs from $3,331.20 to $178.43. Because no party prevailed in full on appeal, neither party may tax costs under MCR 7.219. We do not retain jurisdiction.

RIORDAN, P.J., and RONAYNE KRAUSE, J., concurred with SWARTZLE, J.

ALLEN v CHARLEVOIX ABSTRACT & ENGINEERING COMPANY

Docket No. 339162. Submitted December 11, 2018, at Lansing. Decided January 3, 2019, at 9:00 a.m. Amended by order of the Court of Appeals entered June 17, 2019.

Plaintiff, Jason Allen, was injured in a work-related automobile accident while employed by defendant Charlevoix Abstract & Engineering Company (Charlevoix), and he began receiving benefits from Charlevoix's workers' compensation insurance carrier, defendant Accident Fund Insurance Company of America (Accident Fund). Accident Fund eventually ceased making payments, at which point plaintiff commenced a claim under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Accident Fund promptly reinstated payment of plaintiff's weekly benefits. Shortly thereafter, plaintiff obtained a $450,000 judgment in a civil action against the driver of the other vehicle involved in the accident. After Accident Fund again discontinued plaintiff's disability payments, the parties entered into negotiations, and they ultimately signed a voluntary payment agreement (VPA) under which Accident Fund would initially pay plaintiff $494.50 a week and then a reduced amount of $264.53 for 54.23 weeks in accordance with the formula set forth in *Franges v Gen Motors Corp*, 404 Mich 590 (1979). Accident Fund subsequently discovered that the VPA contained a mathematical error—specifically, that plaintiff's temporary reduction of benefits should have been for 131.7464 weeks instead of 54.23 weeks—and defendants filed a motion to modify or correct the VPA. A workers' compensation magistrate determined that the VPA did contain the mathematical error identified by Accident Fund, but he concluded that he lacked equitable jurisdiction and therefore could not modify the agreement. On appeal, the Michigan Compensation Appellate Commission (MCAC) affirmed the magistrate's ruling. Defendants appealed.

The Court of Appeals *held*:

1. The MCAC correctly determined that the magistrate lacked equitable jurisdiction and therefore lacked the power to modify the VPA. In the absence of an express legislative conferral of authority, an administrative agency generally lacks the powers

of a court of equity, and equity has exclusive jurisdiction to rescind an agreement on the ground of mutual mistake. Accordingly, the magistrate, as a member of an administrative tribunal, had no jurisdiction to grant the requested relief.

2. The Court of Appeals had the power to grant the requested relief. The Supreme Court has invoked its equitable powers to relieve a claimant from a contract founded on a mutual mistake of fact. Further, MCR 7.216(A)(7) gives the Court of Appeals the discretionary power to enter any judgment or order or grant further or different relief as the case may require in the interest of justice, and the Court of Appeals has held that the policy against double recovery by an employee is repugnant to the principles of workers' compensation. Because there was no dispute that the VPA contained a mistake, and there was no dispute about the correct calculation, the parties' VPA was ordered to be reformed to reflect the correct calculation.

MCAC opinion affirmed; case remanded to the MCAC for entry of a corrected VPA.

WORKERS' COMPENSATION — EQUITY — EQUITABLE JURISDICTION — MODIFICATION OF CONTRACTS.

A workers' compensation magistrate lacks the equitable jurisdiction necessary to modify a voluntary payment agreement on the ground of mutual mistake.

Charters Tyler & Zack, PC (by *Morrison Zack*) for plaintiff.

Michael T. Reinholm for defendants.

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. In this workers' compensation matter, defendants appeal by leave granted the decision of the Michigan Compensation Appellate Commission (MCAC) that, in relevant part, declined to reform a "voluntary payment agreement" (VPA) between the parties. There is no dispute that the VPA constitutes a contract or that it contains a mathematical error. The MCAC concluded that the magistrate lacked the equi-

table authority to reform the parties' contract. We hold that the MCAC's determination was correct, but we choose to exercise our own equitable authority to reform the VPA. We therefore affirm, but we order the parties' VPA reformed and the matter remanded to the MCAC for entry of the corrected VPA.

I. FACTUAL BACKGROUND

On June 4, 2007, plaintiff was injured in a work-related automobile accident. Plaintiff was then employed by defendant Charlevoix Abstract & Engineering Company (Charlevoix). Defendant Accident Fund Insurance Company of America (Accident Fund) was Charlevoix's workers' compensation insurance carrier. Nonparty Harleysville Insurance Company (Harleysville) was Charlevoix's automobile insurance carrier.

Initially, Accident Fund voluntarily paid benefits to plaintiff, but it eventually ceased payments, whereupon plaintiff commenced a workers' disability compensation claim. Accident Fund promptly reinstated payment of plaintiff's weekly benefits. Shortly thereafter, plaintiff obtained a $450,000 judgment in a civil action against the driver of the other vehicle involved in the accident. Plaintiff only received $100,000 from the other driver, reflecting the limits of the other driver's insurance policy. Consequently, plaintiff collected the remaining $350,000 from Harleysville. Eventually, Accident Fund again discontinued plaintiff's disability payments, and plaintiff sought to reinstate those benefits.

The parties entered into negotiations, and they ultimately agreed that Accident Fund could set off $100,000 from plaintiff's future benefits pursuant to MCL 418.827. However, the parties were unable to agree whether Charlevoix or Accident Fund could set

off the $350,000 recovery. Plaintiff and Accident Fund entered into the VPA on April 3, 2012. Under the VPA, Accident Fund would pay plaintiff $494.50 a week, but that amount would be "redeuced [sic] to $264.53 for 54.23 [weeks] beginning 3/29/12 based on Franges of $100,000.00 3rd party settlement." The parties also agreed to litigate the consequences of the $350,000 recovery. The word "Franges" in the VPA is a reference to *Franges v Gen Motors Corp*, 404 Mich 590; 274 NW2d 392 (1979). *Franges* set forth how to apportion credit to a workers' compensation insurer when an employee receiving benefits also receives a money judgment against a third-party tortfeasor.

However, Accident Fund then discovered that the VPA contained a mathematical error. Stated briefly, Accident Fund argued that the VPA's "*Franges* worksheet" had made improper use of the benefits it had thus far paid to plaintiff. As a consequence, the remaining calculations derived from that amount were also wrong, culminating in an impossible result of *negative* 54.2328 weeks before full resumption of weekly workers' compensation benefits. Accident Fund provided a corrected *Franges* worksheet, which showed that plaintiff's temporary reduction of benefits should have been for 131.7464 weeks, instead of 54.23 weeks. Defendants filed a motion to modify or correct the VPA.

The magistrate resolved the matter of the $350,000 recovery, which is not at issue in this appeal. The magistrate also determined that the VPA did in fact contain a mathematical error but that he lacked equitable jurisdiction and therefore could not modify the parties' agreement. However, the magistrate also stated that he would have modified the agreement if he had the power to do so and that "the correct *Franges* numbers to be applied . . . would be a future weekly

rate of $264.53 for 131.7464 weeks into the future before resumption of full weekly benefits." On appeal, the MCAC affirmed the magistrate's ruling that he lacked equitable power or authority to modify the VPA. The MCAC declined to address the magistrate's "dicta" detailing how he would have modified the VPA given the power to do so. Nevertheless, the MCAC did observe that the facts in the matter were essentially undisputed.

We likewise observe that nothing in plaintiff's brief submitted to this Court appears to challenge the magistrate's finding that the VPA contained a mathematical error and acceptance of Accident Fund's calculations as correct. To the contrary, in his brief submitted to the MCAC, plaintiff affirmatively conceded that "if the MCAC reverses the magistrate's ruling on the jurisdictional issue," the correct calculation would be a reduction of weekly benefits to $264.53 for 131.7464 weeks. We therefore treat as an established and undisputed fact that the VPA did contain a mathematical error, and Accident Fund's recomputation is objectively correct.

II. STANDARD OF REVIEW

In the context of an MCAC appeal, inquiries "into the nature, scope, and elements of a remedy," including an equitable remedy, are questions of law reviewed de novo, as are questions regarding the proper construction of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 57; 658 NW2d 460 (2003). We begin by reviewing the MCAC's decision, not the magistrate's decision. *Omian v Chrysler Group LLC*, 309 Mich App 297, 306; 869 NW2d 625 (2015). "[A] decision of the [M]CAC is subject to reversal if it is

based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). Because defendants specifically asked the MCAC to review the issues raised on appeal, those issues are properly preserved. See *Auto-Owners*, 468 Mich at 65-66.

III. EQUITABLE POWERS OF WORKERS' COMPENSATION MAGISTRATES

The primary issue presented on appeal is whether the MCAC correctly determined that the magistrate lacked the equitable power necessary to modify the VPA. A contract is legally enforceable even if procured by fraud or mistake, and thus "plenary relief traditionally rests exclusively in equity . . . ." *Solo v Chrysler Corp (On Rehearing)*, 408 Mich 345, 352; 292 NW2d 438 (1980). We conclude that the MCAC correctly determined that the magistrate lacked equitable jurisdiction and therefore lacked the power to modify the VPA.

"Long ago, we recognized that the right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury." *Madugula v Taub*, 496 Mich 685, 705; 853 NW2d 75 (2014) (quotation marks, citation, and brackets omitted). "That is, '[t]he cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore.' " *Id*., quoting *Brown v Buck*, 75 Mich 274, 285; 42 NW 827 (1889). Thus, an administrative agency possesses the jurisdiction to address any questions within its remit, but "it must be borne in mind that it is an administrative tribunal only and not a court possessing general equitable and legal powers." *Mich Mut Liability Co v Baker*, 295 Mich 237, 242; 294

NW 168 (1940) (quotation marks and citation omitted). "In the absence of an express legislative conferral of authority, an administrative agency generally lacks the powers of a court of equity." *Delke v Scheuren*, 185 Mich App 326, 332; 460 NW2d 324 (1990).

This Court has specifically observed that the MCAC's predecessor, the former Bureau of Workmen's Compensation, "lack[ed] the requisite jurisdiction of a court of equity to undertake the task of reformation of [an] insurance policy." *Auto-Owners Ins Co v Elchuk*, 103 Mich App 542, 546; 303 NW2d 35 (1981), relying on *Baker* and its progeny. *Elchuk* was also consistent with *Scott v Grow*, 301 Mich 226; 3 NW2d 254 (1942), in which our Supreme Court observed that " 'jurisdiction to reform written agreements' " " 'is exclusively vested in courts of equity' " and not in courts of law. *Scott*, 301 Mich at 238-239, quoting *Bush v Merriman*, 87 Mich 260, 268; 49 NW 567 (1891). "Equity has exclusive jurisdiction to rescind an agreement on the ground of mutual mistake." *Solo*, 408 Mich at 353. Consequently, it is well established that the relief sought in this matter, modification of a contract, is strictly equitable in nature, and the magistrate, as a member of an administrative tribunal, had no equitable jurisdiction.

Nevertheless, some confusion may have resulted from this Court's observation that "[w]hile the [MCAC] has no equitable *jurisdiction*, it is well established that it may apply equitable *principles* in appropriate instances to further the purposes of the [WDCA]." *Lulgjuraj v Chrysler Corp*, 185 Mich App 539, 544-545; 463 NW2d 152 (1990) (emphasis added). To the extent *Lulgjuraj* can be understood to suggest that the MCAC may exercise equitable powers, such as the power to reform a contract, *Lulgjuraj* unambiguously conflicts with well-established and thoroughly settled caselaw

from our Supreme Court to the contrary. Our Supreme Court has explained that equitable jurisdiction is not precisely the same as equitable relief and that parties sometimes conflate "equity jurisdiction with equity jurisprudence." *Solo*, 408 Mich at 353. Nevertheless, "[e]quity has exclusive jurisdiction to rescind an agreement on the ground of mutual mistake." *Id*. Because *Lulgjuraj* was decided before November 1, 1990, it is not strictly binding pursuant to MCR 7.215(J)(1), and even if it were, we would be required to ignore it in favor of any conflicting Supreme Court precedent. See *Paige v City of Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006).

In summary, the MCAC correctly determined that the magistrate lacked equitable jurisdiction and therefore lacked the power to reform or modify the VPA.

IV. THIS COURT'S POWER TO MODIFY THE VPA

Defendants argue in the alternative that we may exercise our own equitable powers to reform the VPA, and they urge us to do so. We agree that we have the power to grant the requested relief, and because both the existence and nature of the mistake is undisputed, we exercise our jurisdiction to do so.

We unambiguously have the power to grant the requested relief. Our Supreme Court "has repeatedly invoked its equitable powers to relieve a claimant from a settlement procured by fraud," and it found no reason why it should not do the same in the case of a contract founded on a mutual mistake of fact. *Solo*, 408 Mich at 352-353. We have the discretionary power to "enter any judgment or order or grant further or different relief as the case may require" in the interest of justice. MCR 7.216(A)(7). Furthermore, "the policy against double recovery by the employee" is "repugnant to the very

principles of workers' compensation." *Maner v Ford Motor Co*, 196 Mich App 470, 479; 493 NW2d 909 (1992) (quotation marks and citation omitted), aff'd and fully adopted by the Supreme Court 442 Mich 620 (1993). Because there is no dispute that the VPA contains a mistake, and there is no dispute about the correct calculation, we order that the parties' VPA be reformed to reflect the correct calculation.

V. CONCLUSION AND RELIEF

We affirm the MCAC's conclusions that modifying the VPA is equitable in nature and that the magistrate lacked the equitable power to do so. We order the parties' VPA reformed to reflect the undisputed correct mathematical calculation, and we remand to the MCAC for entry of a corrected VPA. We do not retain jurisdiction. In light of the relief we hereby grant, we deem no party to have prevailed in full, and therefore direct that the parties shall bear their own costs of appeal. MCR 7.219(A).

SWARTZLE, P.J., and SAWYER, J., concurred with RONAYNE KRAUSE, J.

ESTATE OF DIANA LYKOS VOUTSARAS v BENDER

Docket No. 340714. Submitted December 11, 2018, at Lansing. Decided January 3, 2019, at 9:05 a.m. Leave to appeal denied by equal division 505 Mich ___ (2020).

Kathleen M. Gaydos, as personal representative of the estate of Diana Lykos Voutsaras (the Estate), brought an action in the Ingham Circuit Court against Gary L. Bender, Richard A. Cascarilla, Lindsay N. Dangl, Vincent P. Spagnuolo, and Murphy & Spagnuolo, PC (collectively, the law-firm defendants) and Kenneth M. Mogill, Mogill Posner & Cohen, Kern G. Slucter, and Gannon Group, PC (the Mogill defendants), alleging that the law-firm defendants and the Mogill defendants engaged in professional malpractice during litigation involving the foreclosure of a commercial mortgage and note made by Diana and Spiro Voutsaras and held by Gallagher Investments. The Voutsarases had hired the law-firm defendants to represent them in the foreclosure proceedings and, on the advice of the law-firm defendants, filed a counterclaim against Gallagher and a third-party claim against some of the principal actors involved with Gallagher for malpractice. The law-firm defendants then hired the Mogill defendants to provide litigation support and to serve as expert witnesses at trial. Ultimately the law-firm defendants informed the Voutsarases that their litigation strategy was bound to fail, and the court granted summary disposition against the Voutsarases. Diana Voutsaras passed away in January 2015, and the Estate then brought the present action against the law-firm defendants and the Mogill defendants. The Estate claimed that the law-firm defendants failed to advise Diana Voutsaras of a favorable settlement offer and that the law-firm defendants deliberately concealed the fact that the Voutsarases' claims were frivolous in order to drive up their costs before trial. The Estate further claimed that the Mogill defendants breached their duty to Diana Voutsaras by failing to properly investigate the facts required to formulate their opinions, failing to understand the applicable standards, and failing to provide a competent professional opinion. The Mogill defendants moved for summary disposition, arguing that the Estate could not state a claim against them because under Michigan law, witnesses are immune from civil liability arising out of their testimony and related evalua-

tions. The court, Joyce Draganchuk, J., granted summary disposition to the Mogill defendants on that theory. The Estate and the law-firm defendants entered into a settlement agreement, and the court, Matthew J. Stewart, J., entered a stipulated order of dismissal. The Estate appealed the summary-disposition order.

The Court of Appeals *held*:

1. Whether a party's own expert witnesses are immune from liability for the negligent performance of professional services was a question of first impression in Michigan. In *Maiden v Rozwood*, 461 Mich 109 (1999), the Supreme Court held that witnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity and that witness immunity should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. However, *Maiden* was only partially applicable in this case. The policy considerations in *Maiden* were focused on the freedom witnesses must have to give *damaging* testimony without any fear of possible reprisal; however, whether witness immunity protected the Mogill defendants from giving *professionally incompetent* testimony, which might or might not be favorable, was not a matter considered by the *Maiden* Court. Additionally, the witness-immunity doctrine at issue in *Maiden* addressed only actual testimony, and the Estate's complaint alleged that the Mogill defendants not only provided incompetent opinions but also failed to undertake reasonable skill and care in forming those opinions. Therefore, to the extent that the Estate's claims rested on the Mogill defendants having provided damaging testimony or evidence intended for consideration by the trial court, the Mogill defendants were protected by the doctrine of witness immunity; however, nothing in *Maiden*, or in any other Michigan caselaw, suggested that any other claim of professional malpractice by a client was precluded merely because the professional was expected to provide expert testimony. Accordingly, the Mogill defendants were not absolutely immune from professional-malpractice claims merely because part of their retention included the provision of expert testimony. The trial court erred by construing the doctrine of witness immunity too broadly.

2. A review of caselaw from federal courts and other state courts supported the conclusion that when a duty of professional care exists such that a malpractice action may be maintained, witness immunity is not a defense to a malpractice action except insofar as the action is premised on the substance of the professional's evidence or testimony prepared for the benefit of the court.

Reversed and remanded for further proceedings.

WITNESSES — PROFESSIONAL-MALPRACTICE ACTIONS — WITNESS IMMUNITY.

A professional's client is not precluded by witness immunity from maintaining a professional-malpractice action except to the extent the action is premised on the substance of evidence or testimony prepared for the benefit of the court.

The Gallagher Law Firm PLC (by *Byron P. Gallagher, Jr.*, and *Samuel A. Lusk*) for Kathleen M. Gaydos, as personal representative of the estate of Diana Lykos Voutsaras.

Maddin Hauser Roth & Heller, PC (by *Kathleen H. Klaus* and *Jesse L. Roth*) for Kenneth Mogill and Mogill Posner & Cohen.

Fahey Schultz Burzych Rhodes PLC (by *John S. Brennan*) for Kern G. Slucter and Gannon Group, PC.

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Plaintiff-appellant, the estate of Diana Lykos Voutsaras (the Estate) appeals as of right the trial court's order granting summary disposition in favor of defendants Kenneth M. Mogill, Mogill Posner & Cohen, Kern G. Slucter, and Gannon Group, P.C. (collectively, the Mogill defendants).[1] This appeal arises, in relevant part, out of the Estate's action against the Mogill defendants for professional malpractice in their services as expert witnesses. The trial court held that a party's own expert witnesses, regard-

[1] On October 2, 2017, Ingham Circuit Court Judge Matthew J. Stewart entered a stipulated order of dismissal following a settlement agreement between plaintiff Kathleen Gaydos, as the personal representative of the estate of Diana Voutsaras, and defendants Gary Bender, Richard Cascarilla, Lindsay Dangl, Vincent Spagnuolo, and Murphy & Spagnuolo, P.C. (collectively, the law-firm defendants), who were Diana and Spiro Voutsaras's attorneys in the underlying litigation.

less of any duty to their client, are shielded by witness immunity. We hold that licensed professionals owe the same duty to the party for whom they testify as they would to any client and that witness immunity is not a defense against professional malpractice. Therefore, we reverse and remand.

I. STATEMENT OF FACTS

The underlying litigation involved the foreclosure of a commercial mortgage and note made by Diana and Spiro Voutsaras and held by Gallagher Investments (Gallagher). The Voutsarases hired the law-firm defendants[2] to represent them in the foreclosure proceedings. The Voutsarases, on the advice of the law-firm defendants, filed a counterclaim against Gallagher and a third-party claim against some of the principal actors involved with Gallagher for malpractice. The law-firm defendants then hired the Mogill defendants to provide litigation support and ultimately serve as expert witnesses at trial. Kenneth Mogill was considered to be a preeminent authority on legal ethics in the state of Michigan, and Slucter and Gannon Group were experts in the field of real estate brokerage and best practices in the field. Ultimately the law-firm defendants informed the Voutsarases that their litigation strategy was bound to fail, and the trial court granted summary disposition against the Voutsarases.

Diana Voutsaras passed away in January 2015, and the Estate then brought the present action against the law-firm defendants and the Mogill defendants. The Estate claimed that the law-firm defendants failed to advise Diana Voutsaras of a favorable settlement offer and that the law-firm defendants deliberately con-

[2] See note 1 of this opinion.

cealed the fact that the Voutsarases' claims were frivolous in order to drive up their costs before trial. The Estate claimed that the Mogill defendants breached their duty to Diana Voutsaras by failing to properly investigate the facts required to formulate their opinions, failing to understand the applicable standards, and failing to provide a competent professional opinion. Noting that the ability to sue one's own expert witnesses was an issue of first impression in Michigan, the trial court engaged in a broad reading of prior witness-immunity standards and granted summary disposition to the Mogill defendants on that theory. This appeal followed.

II. PRESERVATION AND STANDARD OF REVIEW

A. PRESERVATION OF THE ISSUE

An issue is preserved for appellate review if raised in the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). The Estate argued that whether a party may sue his or her own expert witness was an issue of first impression in Michigan and that the trial court should follow caselaw from sister state courts on that matter. The trial court agreed that this issue was an open question in Michigan but determined that defendant Mogill was entitled to witness immunity because that doctrine is broadly construed and because the policy considerations underlying the doctrine would be advanced by its application in this case. The issue is preserved.

B. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Bowden v Gannaway*, 310

Mich App 499, 503; 871 NW2d 893 (2015). A court may grant summary disposition under MCR 2.116(C)(7) "because of . . . immunity granted by law . . . ." "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court also reviews de novo the applicability of legal doctrines, *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999), and claims of immunity, *Denhof v Challa*, 311 Mich App 499, 510; 876 NW2d 266 (2015).

III. ARGUMENT

A. DUTY OF AN EXPERT WITNESS WHO IS A LICENSED PROFESSIONAL

The Estate claims that defendants owed to Diana Voutsaras a legal duty and that defendants breached that duty. Duty is "the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury." *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). As will be discussed further, our decision in this matter is limited to a claim of professional malpractice, which "arises from the breach of a duty owed by one rendering professional services to a person who has contracted for such services" and is "predicated on the failure of the defendant to exercise the requisite professional skill." *Broz v Plante & Moran, PLLC*, 326 Mich App 528, 535-536; ___ NW2d ___ (2018) (quotation marks and citation omitted). "Generally, to state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship, (2) negligence in the performance of the duties within that relationship, (3) proxi-

mate cause, and (4) the fact and extent of the client's injury." *Id*. at 537.

The trial court granted summary disposition to defendants solely on the basis of witness immunity. Defendants now argue on appeal that regardless of witness immunity, the Estate has failed to show that defendants owed a legal duty to Diana Voutsaras. "An issue not addressed by the trial court may nevertheless be addressed by the appellate court if it concerns a legal issue and the facts necessary for its resolution have been presented." *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002). We are not satisfied that this record presents us with the facts necessary to resolve this issue. Nevertheless, we presume for the sake of argument that defendants are subject to claims for professional malpractice by the Estate and breached their professional duties to Diana Voutsaras. However, we do not decide those questions, and we leave for the trial court to determine in the first instance whether, in fact, defendants owed or breached a legal duty to Diana Voutsaras. We address only whether defendants are immune from liability related to that duty, if any.

B. WITNESS IMMUNITY AS A DEFENSE TO MALPRACTICE

1. MICHIGAN CASELAW

Defendants and the trial court rely on our Supreme Court's opinion in *Maiden*, 461 Mich 109, for the proposition that all witnesses enjoy total immunity for any relevant testimony provided during judicial proceedings. Our Supreme Court observed that "the duty imposed on a witness is generally owed to the court, not the adverse party," so a breach of that duty "does not give rise to a cause of action in tort by the adverse party." *Id*. at 133-134. Our Supreme Court continued:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as "those persons other than judges without whom the judicial process could not function." 14 West Group's Michigan Practice, Torts, § 9:393, p 9-131. Witnesses who are an integral part of the judicial process "are wholly immune from liability for the consequences of their testimony or related evaluations." *Id*., § 9:394, pp 9-131 to 9-132, citing *Martin v Children's Aid Society*, 215 Mich App 88, 96; 544 NW2d 651 (1996). Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. See *Martin v Children's Aid Society*, *supra*; *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 164; 398 NW2d 245 (1986); *Meyer v Hubbell*, 117 Mich App 699, 709; 324 NW2d 139 (1982); *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961). Falsity or malice on the part of the witness does not abrogate the privilege. *Sanders*, *supra*. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. *Id*. [*Maiden*, 461 Mich at 134.]

We find *Maiden* only partially applicable, for several reasons.

First, the policy considerations in *Maiden* were clearly focused on the freedom witnesses must have to give *damaging* testimony without any fear of possible reprisal. We agree with defendants and the trial court to the extent that such policy considerations extend beyond witnesses who are formally or functionally adverse. In other words, any witness called by any party enjoys immunity based on the substance of that witness's testimony or evidence. Therefore, to the extent the Estate may assert that the Mogill defendants gave testimony that was *unfavorable* to Diana Voutsaras, such assertions unambiguously run afoul of the witness-

immunity doctrine in Michigan. However, whether witness immunity protects the Mogill defendants from giving *professionally incompetent* testimony, which might or might not be favorable, was clearly not a matter considered by the *Maiden* Court. As our Supreme Court recently explained, to derive a rule of law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture." *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016).

Additionally, the witness-immunity doctrine at issue in *Maiden* addresses only actual testimony. That immunity necessarily extends to any other materials or evidence prepared by the witness for the intended benefit of the court. See *Denhof*, 311 Mich App at 511-520. Nevertheless, the Estate's complaint appears to allege that the Mogill defendants provided expert opinions for the benefit of Diana Voutsaras or her attorneys *in addition to* intended expert testimony for the court. Furthermore, the Estate alleges that the Mogill defendants not only provided incompetent opinions but failed to undertake reasonable skill and care in forming those opinions. As previously discussed, we presume that the Mogill defendants owed Diana Voutsaras a duty of professional care; the Estate essentially alleges a perfectly ordinary claim of legal malpractice, asserting that the Mogill defendants breached that duty of professional care.

To the extent that the Estate's claims rest on the Mogill defendants having provided damaging testimony or evidence intended for consideration by the trial court, the Mogill defendants are clearly protected by the doctrine of witness immunity. However, we find nothing in *Maiden*, or in any other Michigan caselaw, suggesting that any other claim of professional mal-

practice by a client is precluded merely because the professional was expected to provide expert testimony. We decline to parse which particular claims in this matter are immunized. We hold only that the Mogill defendants are not absolutely immunized from professional-malpractice claims where they already owed a duty of professional care merely because part of their retention included the provision of expert testimony.

2. OTHER JURISDICTIONS

Although not binding, authority from other jurisdictions may be considered for its persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). We have considered the extrajurisdictional caselaw provided to us by the parties, and we find, on balance, that the most persuasive precedent supports our conclusion.

In *Briscoe v LaHue*, 460 US 325; 103 S Ct 1108; 75 L Ed 2d 96 (1983), the United States Supreme Court, whose holdings are obviously binding on this Court, held that the common-law standard of witness immunity was not abridged by federal law and therefore that a police officer could not be held liable for perjured testimony given during the plaintiff's trial. The Court proceeded to lay out the policy reasons behind witness immunity, holding: "A witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Id*. at 333 (citation omitted). The Court explained that "the truthfinding process is better served if the witness's testimony is submitted to 'the crucible of the judicial process so that the fact-

finder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.' " *Id*. at 333-334, quoting *Imbler v Pachtman*, 424 US 409, 440; 96 S Ct 984; 47 L Ed 2d 128 (1976) (White, J., concurring in the judgment). This case merely reaffirms that a witness must be immune to the consequences of providing damaging testimony, which in turn must extend to a party's own witnesses.

In *Mattco Forge, Inc v Arthur Young & Co*, 5 Cal App 4th 392; 6 Cal Rptr 2d 781 (1992), the California Court of Appeals held that California's "litigation privilege" statute[3] did not bar a party from bringing suit against its own expert. In that case, the plaintiff (Mattco) engaged the defendant (Arthur Young) "to perform litigation support accounting work" in the underlying action. *Id*. at 395. After the dismissal of that suit, Mattco brought suit against Young, alleging, in part, professional malpractice, negligence, and breach of contract. *Id*. at 396. The California Court of Appeals determined that the policy considerations behind the litigation privilege—freedom of access to courts and the encouragement of truthful testimony—would be best served by allowing malpractice proceedings against expert witnesses:

> Arthur Young was not a "neutral expert," but one hired by Mattco. If an expert witness's negligence and breach of contract cause dismissal of the party who hired that expert witness, that does not expand freedom of access to the courts. Applying the privilege in this circumstance does not

[3] That statute provided, in part: " 'A privileged publication or broadcast is one made: . . . In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 . . . .' " *Mattco Forge, Inc*, 5 Cal App 4th at 402, quoting Cal Civ Code 47(b).

> encourage witnesses to testify truthfully; indeed, by shielding a negligent expert witness from liability, it has the opposite effect. Applying the privilege where the underlying suit never reached the trial stage would also mean that the party hiring the expert witness would have to bear the penalty for the expert witness's negligence. That result would scarcely encourage the future presentation of truthful testimony by that witness to the trier of fact. [*Id*. at 404.]

The California Court of Appeals found the distinction between one's own witnesses and adversarial witnesses to be of unique importance, because the policies underlying witness immunity "can logically apply . . . only to trial testimony of adverse witnesses" and thus were immaterial to "a pretrial dispute between a party and its own expert witness that arose during discovery." *Id*. at 406.

In *Murphy v A A Mathews*, 841 SW2d 671, 672 (Mo, 1992), the defendant engineering firm was retained by a subcontractor to prepare claims for additional compensation. The firm testified at arbitration, and the subcontractor was awarded substantially less than what it was seeking. *Id*. The subcontractor then filed suit against the engineering firm, alleging that the engineering firm "was negligent in its performance of professional services involving the preparation and documentation of [the subcontractor's] claims for additional compensation . . . ." *Id*. The Missouri Supreme Court observed that witness-immunity decisions generally entailed statements made "directly in the judicial proceeding itself or in an affidavit or pleading, and all of the statements were made by adverse witnesses or parties." *Id*. at 677. It concluded that witness immunity was not properly applied "to bar a suit against a privately retained professional who negligently provides litigation support services." *Id*. at 680. The court reasoned that the policies underlying wit-

ness immunity would not be served by protecting "professionals selling their expert services rather than as an unbiased court servant." *Id*. at 681. Furthermore, subjecting professionals to liability for negligence would encourage skill, care, and prudence and would discourage "extreme and ridiculous positions in favor of their clients in order to avoid a suit by them." *Id*. The court also emphasized the role expert witnesses play in case preparation, providing advice and advocacy, and even playing as much of "a role in the organization and shaping and evaluation of their client's case as do the lawyers." *Id*. at 682. It therefore permitted the action against the engineering firm.

In *LLMD of Mich, Inc v Jackson-Cross Co*, 559 Pa 297, 298; 740 A2d 186 (1999), the plaintiffs hired an accounting firm in the underlying action to calculate their lost profits. At trial, a critical mathematical error in the firm's calculations was revealed during cross-examination of the firm's chairman. *Id*. at 299. The chairman had not personally prepared the lost-profits calculation and could not explain the error. *Id*. The trial court granted a motion to strike the chairman's testimony. The next day, the plaintiffs accepted a settlement offer for $750,000; the firm later recalculated the lost profits at $2.7 million. *Id*. The plaintiffs then sued the firm for breach of contract and professional malpractice. *Id*. at 300. The Pennsylvania Supreme Court held that witness immunity did not bar the action but emphasized that it arrived at this conclusion because the gravamen of the action was negligence in formulating the expert opinion rather than dissatisfaction with the substance of the opinion. *Id*. at 304-307. In particular, "[a]n expert witness must be able to articulate the basis for his or her opinion without fear that a verdict unfavorable to the client will result in litigation . . . ." *Id*. at 306. However, "immunizing an expert witness from his

or her negligence in formulating that opinion" would not serve the purposes behind witness immunity. *Id*. Rather, "[t]he judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession." *Id*. at 306-307. Thus, the court held that the accounting firm was not entitled to witness immunity. *Id*.

The Connecticut Superior Court (a trial court) followed *LLMD of Mich, Inc* in *Pollock v Panjabi*, 47 Conn Supp 179; 781 A2d 518 (2000). In *Pollock*, the plaintiffs retained a spinal biomechanics expert to perform experiments relating to the underlying personal-injury action. *Id*. at 180. After pretrial voir dire of the expert, the trial court ruled that the expert's opinion was not credible and was not admissible at trial. *Id*. at 182. The trial court granted numerous continuances so that the expert could perform additional experiments, but the expert repeatedly failed to follow the conditions set forth by the trial court. *Id*. at 182-183. Ultimately, the plaintiffs brought suit against the expert and a kinesiologist hired by the expert alleging, in part, breach of contract and negligence. *Id*. at 183. The Connecticut Superior Court held that the defendants were not entitled to invoke witness immunity, determining that the

> policy reasons undergirding the absolute privilege accorded witnesses are not implicated here. This is not a case in which the right of a witness to speak freely, in or out of court, is involved. While conduct, objects and experiments may have communicative aspects, the plaintiffs do not complain about what [the spinal biomechanics expert] said or about anything [the kinesiologist], who never testified, said or communicated. Rather, the plaintiffs complain of the defendants' failure to perform work,

> as agreed upon, according to scientific principles as to which there are no competing schools of thought. [*Id*. at 188 (citation omitted).]

The court concluded that the gravamen of the plaintiffs' claim was to "hold the defendants accountable for not doing what they agreed to do," which did not undermine the witness-immunity policy of ensuring that witnesses could speak freely. *Id*. at 194.

We find these cases to be the most persuasive. However, additional state courts have allowed a party to sue its own expert, determining that the policy considerations underlying the doctrine of witness immunity would not be furthered by application in those cases. See *Boyes-Bogie v Horvitz*, 14 Mass L Rptr 208 (Mass Super, 2001) (holding that witness immunity did not bar an action against a friendly expert who was negligent in valuing a marital asset); *Marrogi v Howard*, 805 So 2d 1118, 1131; 2001-1106 (La 1/15/02) (holding, in a case in which the friendly expert made numerous errors in estimating the plaintiff's billings and in which summary judgment was granted on the basis of the expert's deposition testimony, that "claims in connection with a retained expert's alleged failure to provide competent litigation support services are not barred by the doctrine of witness immunity"); *Hoskins v Metzger*, 102 So 3d 752, 753 (Fla App, 2012) (holding that it was erroneous for the trial court to dismiss an action against a friendly expert on the basis of witness immunity when the plaintiffs were alleging that they lost at trial because of the expert's appearance at trial and "his inadequate testimony").

3. WITNESS IMMUNITY AS A DEFENSE AGAINST MALPRACTICE

It bears repeating that the *Maiden* Court prefaced its discussion of witness immunity by ruling that the

medical examiner was an adverse witness to the plaintiff. *Maiden*, 461 Mich at 133. Witness immunity protects all witnesses, including experts retained by a party, from suit for testimony or evidence premised on the damaging nature thereof. However, we note that a common theme in the cases discussed earlier was whether to *extend* witness immunity to ordinary professional-malpractice claims. We find no Michigan law suggesting that witness immunity already precludes a claim by a client against a retained professional for the negligent performance of professional services. We are persuaded by the reasoning in the above cases that witness immunity should not be further extended. When a duty of professional care exists such that a malpractice action may be maintained, witness immunity is not a defense to a malpractice action except, as noted, insofar as the action is premised on the substance of the professional's evidence or testimony intended to be provided to the court.

IV. CONCLUSION

We conclude that the trial court erred by construing the doctrine of witness immunity too broadly. A professional's client is not precluded from maintaining a professional-malpractice action by witness immunity except to the extent the action is premised on the substance of evidence or testimony prepared for the benefit of the court. We decline to address any other issues, such as the specific duties owed in this matter or the extent to which plaintiff's specific allegations actually implicate witness immunity. We reverse the trial court's grant of summary disposition pursuant to MCR 2.116(C)(7), and we remand for further proceedings. We do not retain jurisdiction. An important public question

of first impression being involved, we direct that the parties shall bear their own costs. MCR 7.219(A).

SWARTZLE, P.J., and SAWYER, J., concurred with RONAYNE KRAUSE, J.

LAW OFFICES OF JEFFREY SHERBOW, PC v FIEGER & FIEGER, PC

Docket No. 338997. Submitted December 11, 2018, at Detroit. Decided January 15, 2019, at 9:00 a.m. Leave to appeal sought.

The Law Offices of Jeffrey Sherbow, PC, brought an action in the Oakland Circuit Court against Fieger & Fieger, PC, asserting that defendant breached its referral-fee contract with plaintiff when defendant refused to pay plaintiff 20% of a contingent fee that defendant had received after defendant successfully represented several clients in a personal-injury and no-fault action related to an automobile accident. Plaintiff alleged that Sherbow, an attorney and sole proprietor of plaintiff, had referred the personal-injury and no-fault cases to Jeffrey Danzig, an attorney who at the time was a named partner at defendant. Plaintiff alleged that Danzig originally agreed to pay Sherbow 1/3 of any contingent fee that defendant ultimately earned from the cases. On July 26, 2012, Dion Rice, who was the son of a man killed in the accident, and Mervie Rice, who had been seriously injured in the accident, met with Sherbow and Danzig. Dion and Mervie signed retainer agreements with defendant at that meeting, with Dion agreeing to defendant's representation of his father's estate and of Dorothy Dixon, his mother, who was seriously injured in the accident and in a medically induced coma at the time. The retainer agreements did not reflect any referral agreement that defendant had with plaintiff; however, Danzig and Sherbow testified that Danzig informed Mervie and Dion of the agreement and that those two did not object. Mervie and Dion testified that they did not believe they were informed and could not remember everything that was said during the meeting but that if they had been informed, they would have objected. Danzig later met with another client who had been injured in the accident, Philip Hill, and with Dixon, at which time, according to Danzig, he informed them that plaintiff would be paid a referral fee. Danzig testified that Hill and Dixon did not object. Like Dion and Mervie, Hill and Dixon testified that they did not believe they were informed of the referral agreement and could not remember the entire conversation with Danzig but that if they had been informed, they would have objected. Following the meeting, Danzig sent two letters to

Sherbow, reciting that defendant had "accepted the above-captioned matters on referral from you and your office and are hereby acknowledging your one-third referral fee in these matters." Because the cases were being tried in Ohio, defendant sought the assistance of an Ohio law firm. When the Ohio firm demanded 20% of the contingent fee earned in the case, Sherbow agreed to have his referral fee lowered to 20% as well. Danzig memorialized the new agreement in a letter that specifically noted that Sherbow was to receive 20% of the contingent fee for his referral of the cases. Eventually, defendant was successful in its representation of the clients and received a contingent fee. When defendant refused to pay plaintiff 20% of that fee, plaintiff brought the instant litigation. Defendant moved for summary disposition three separate times, arguing that the referral-fee agreement was unenforceable because it violated MRPC 1.5(e) and that Danzig did not have the authority to bind defendant to a contract with plaintiff. The trial court denied the motions, and the case proceeded to trial. The court, over plaintiff's repeated objections, instructed the jury that plaintiff had to prove by a preponderance of the evidence that MRPC 1.5(e) had not been violated and that, in order for plaintiff to be entitled to judgment, Sherbow had to have had attorney-client relationships with Dion on behalf of the estate, Mervie, Dixon, and Hill at the time of the referral. Plaintiff also objected to the verdict form, which asked the jury to answer two questions with respect to each client: "Were any of the following clients of Jeffrey Sherbow," and "[i]f yes to any part of 1, did Plaintiff refer one, some, or all of the following personal injury cases to Defendant?" The verdict form then had a third, general question: "If yes to any parts of 1 and 2, did Jeffrey Danzig have actual or apparent authority to bind Fieger Firm?" The jury answered that Sherbow had an attorney-client relationship with Dion on behalf of the estate and actually referred that case to defendant. The jury found the opposite for the other three clients. As for the third question, the jury determined that Danzig did have the actual or apparent authority to bind defendant to a contract. Therefore, the trial court, James M. Alexander, J., entered judgment in favor of plaintiff with respect to the contingent fee earned for the estate, awarding plaintiff $93,333.33, and for no cause of action for the remaining three claims. Plaintiff moved for judgment notwithstanding the verdict (JNOV) with respect to the fees arising from Dixon's case, arguing that Dion acted on behalf of both the estate and Dixon, who had been in a coma. The trial court denied that motion. Plaintiff appealed, and defendant cross-appealed.

The Court of Appeals *held*:

1. Contracts containing performance requirements that would violate the Michigan Rules of Professional Conduct are not enforceable because those contracts contradict Michigan's public policy. MRPC 1.5(e) states, in pertinent part, that a division of a fee between lawyers who are not in the same firm may be made only if the client is advised of and does not object to the participation of all the lawyers involved and the total fee is reasonable. MRPC 1.5(e) unambiguously only requires that clients be advised and not object to the referral-fee agreement; a lack of objection by the clients does not mean that the clients have to affirmatively approve of the agreement. Accordingly, the trial court properly denied summary disposition because there was a genuine issue of material fact regarding whether the clients were aware of the fee-split agreement and did not object to it.

2. An agency is defined as a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions. The authority of an agent to bind a principal may be either actual or apparent. Actual authority may be express or implied. Implied authority is the authority that an agent believes he possesses. Actual authority of an agent may be implied from the circumstances surrounding the transaction at issue, which must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal. Apparent authority arises when the acts and appearances lead a third person to reasonably believe that an agency relationship exists; however, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent. In this case, the question was whether an ordinarily prudent person, conversant with the business in question, would be justified in assuming that Danzig had the authority to enter into the contract on defendant's behalf, and the inquiry focused on the actions of defendant when determining whether Danzig had apparent authority. The record showed that a question of fact existed as to whether a third party would reasonably believe that Danzig had apparent authority: defendant had made Danzig a partner in the firm, which reasonably suggested to those dealing with Danzig that he acted on behalf of defendant; defendant had put Danzig's name on the firm letterhead; and defendant had named Danzig as the head of the intake department. The fact that defendant had an internal policy that any referrals had to be approved by Geoffrey Fieger did not affect this conclusion because the inquiry properly focused on Danzig's apparent, rather than actual, authority. Accordingly, the trial court properly denied summary

disposition because there was a genuine issue of material fact regarding whether Danzig had the apparent authority to bind defendant to the contract.

3. The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion. To be admissible, evidence must be relevant. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. At issue in this case was whether the clients knew of the referral-fee agreement and did not object, so as to conform to the mandates of MRPC 1.5(e). While defendant was required to prove that the clients objected to the referral-fee agreement at the time they were informed, that did not render a later objection entirely irrelevant so as to be inadmissible. At trial, Danzig testified that he informed all the clients of the referral-fee agreement and that they did not object. Sherbow agreed with respect to the July 26, 2012 meeting that he attended. Mervie, Hill, and Dixon, however, testified that they did not believe they had been informed of the referral-fee agreement, because they could not specifically remember the conversation that had taken place more than four years before trial, but that if they had been informed they would have objected. While the clients' objection at trial could not invalidate the contract pursuant to MRPC 1.5(e), it made it more likely that the clients were not informed of the referral-fee agreement. That testimony was relevant because had the jury believed the clients' assertion that they would have objected if informed but did not object at the time, then it would be logical to infer that they must not have been informed. Therefore, while the objections to the referral-fee agreement at the time of trial were not relevant to whether the clients objected at the time they were informed, those objections *were* relevant to whether the clients were, in fact, informed. Accordingly, the challenged evidence was relevant and admissible, and the trial court did not abuse its discretion in admitting it at trial.

4. Whether the trial court's instruction on the applicable burden of proof was proper is a question of law that is reviewed de novo. Instructional error warrants reversal when it affects the outcome of the trial. In this case, the trial court committed error requiring reversal when it instructed the jury that plaintiff had the burden of proof with respect to defendant's affirmative defense that the contract violated MRPC 1.5(e). Defendant had the burden of providing evidence to support that assertion; only after that evidence has been introduced does the burden shift to plaintiff to

produce clear and decisive evidence to negative the defense. Accordingly, the trial court erred by instructing the jury that plaintiff had the burden of proof with respect to defendant's affirmative defense.

5. The trial court erred when it instructed the jury that Mervie, Hill, and Dixon must have had an attorney-client relationship with Sherbow before being referred to defendant in order to satisfy the requirements of MRPC 1.5(e). MRPC 1.5(e) is designed to prohibit brokering, to protect a client from clandestine payment and employment, and to prohibit aggrandizement of fees. The term "client" in MRPC 1.5(e) means that the person would eventually become the client of the firm or lawyer receiving the referral, not that an attorney-client relationship must have already been established. Requiring a party to establish an attorney-client relationship with the referring attorney before a referral takes place would add a new element to the rule and is not part of MRPC 1.5(e) as it is written. Accordingly, MRPC 1.5(e) did not require that Sherbow have an attorney-client relationship with Mervie, Dixon, and Hill. The trial court erred when it instructed the jury to the contrary and included the question on the verdict form. Reversal was required because the jury instructions and verdict forms were irredeemably deficient: the jury made a dispositive determination of plaintiff's claims against defendant on the basis of an unnecessary requirement, and defendant actually bore the burden to prove that the clients were not informed or did object. The jury's verdict had to be vacated with respect to the first two questions asked on the verdict form, and the case had to be remanded for a new trial.

6. The trial court did not err when it denied plaintiff's motion for JNOV with respect to Dixon. The record was not disputed that Dion agreed to defendant's representation of Dixon at the July 26, 2012 meeting at defendant's office. Dion did so because Dixon was in a medically induced coma at the time. However, Dixon eventually was brought out of the coma, regained consciousness, and was moved to a rehabilitation facility. While there, testimony at trial showed that Danzig came to visit her and explained defendant's legal representation of her. Danzig further testified that he informed Dixon of the referral-fee agreement and that she did not object to it. Dixon presented contrary testimony. Dixon's acknowledgement that she approved of Dion's decision to retain defendant to represent her did not morph Dion into a "client" with respect to either the contract between defendant and Dixon or pursuant to MRPC 1.5(e). Consequently, the jury's finding that Dion was Sherbow's client, that Sherbow referred him to defen-

dant, and that Dion was aware of the referral-fee agreement and did not object did not require a judgment with respect to Dixon. Accordingly, because judgment in plaintiff's favor was not required as a matter of law, the trial court properly denied plaintiff's motion for JNOV. Plaintiff's argument that JNOV should be granted in its favor with respect to Mervie was not raised in the trial court and therefore was not preserved for appeal.

Trial court's order denying summary disposition and JNOV affirmed; jury's verdict with respect to the first two questions on the jury verdict form regarding Mervie, Hill, and Dixon vacated; case remanded for further proceedings.

ATTORNEY AND CLIENT — REFERRAL FEES — CLIENTS ARE NOT REQUIRED TO AFFIRMATIVELY APPROVE OF A REFERRAL-FEE AGREEMENT.

MRPC 1.5(e) states, in pertinent part, that a division of a fee between lawyers who are not in the same firm may be made only if the client is advised of and does not object to the participation of all the lawyers involved and the total fee is reasonable; MRPC 1.5(e) unambiguously only requires that clients be advised and not object to the referral-fee agreement; a lack of objection by the clients does not mean that the clients have to affirmatively approve of the agreement.

Gregory M. Janks and *James G. Gross, PLC* (by *James G. Gross*) for the Law Offices of Jeffrey Sherbow, PC.

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger* and *Sima G. Patel*) for Fieger & Fieger, PC.

Before: MURRAY, C.J., and SHAPIRO and RIORDAN, JJ.

RIORDAN, J. In this contract dispute regarding a referral fee between two law firms, plaintiff appeals as of right and defendant cross-appeals as of right the trial court's entry of judgment after a jury trial. Defendant's cross-appeal is of the trial court's previous order denying defendant's motion for summary disposition. We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In the years preceding 2012, Jeffrey Sherbow, an attorney and the sole proprietor of plaintiff, had a working relationship with Charles Rice, who ran a business in Detroit. During the early morning hours of July 13, 2012, Charles was in a fatal automobile accident in Ohio. The other passengers in the vehicle at the time of the accident—Mervie Rice, Dorothy Dixon, and Philip Hill—were seriously injured. Dixon was taken to an Ohio hospital and placed in a medically induced coma.

When Dion Rice, Charles and Dixon's son, was informed of the accident, he called Charles's business associate, requesting Sherbow's contact information for legal advice. Over the course of the following days, Sherbow and Dion had several conversations via telephone and eventually agreed to meet at Charles's home, where Dion was staying. During that same time period, Sherbow also had several conversations with Jeffrey Danzig, who is an attorney and at the time was a named partner at defendant firm, and commenced the process of referring the personal-injury and no-fault cases of Dixon, Mervie, Hill, and Charles's estate to defendant. Danzig agreed that, for Sherbow's referral, Sherbow would be paid 1/3 of any contingent fee that defendant ultimately earned from the cases.

Sherbow testified that he told Dion, when they met at Charles's house, that he was not equipped to deal with such serious cases, being a sole practitioner, but that he had a friend at defendant to whom he could refer the case. Sherbow said Dion was receptive to the suggestion and assisted Sherbow in reaching out to the other clients. Dion testified that at the time of the meeting, he and his family had already decided to retain defendant. In either event, Sherbow, Dion, and

Danzig set up a meeting for July 26, 2012, at defendant's office. Mervie also was present at the meeting. According to Sherbow, Hill originally was supposed to attend the meeting but could not make it, and Dixon was still in a medically induced coma in Ohio.

At the July 26, 2012 meeting, Mervie and Dion signed retainer agreements with defendant. Dion agreed to defendant's representation of Dixon and Charles's estate. While those retainer agreements did not reflect any referral agreement that defendant had with plaintiff, Danzig and Sherbow testified that Danzig informed Mervie and Dion of the agreement and that those two did not object. Mervie and Dion testified that they did not believe they were informed and could not remember everything that was said during the meeting but that if they had been informed, they would have objected. Mervie further testified that she decided to retain defendant after seeing a commercial on television and called defendant's office without being referred. Danzig later met with Hill and Dixon, at which time, according to Danzig, he informed them of the referral fee that plaintiff would be paid and that Hill and Dixon did not object. Like Dion and Mervie, Hill and Dixon testified that they did not believe they were informed of the referral agreement and could not remember the entire conversation with Danzig but that if they had been informed, they would have objected.

Danzig sent two letters to Sherbow, one on August 2, 2012, and the second on August 15, 2012, reciting that defendant had "accepted the above-captioned matters on referral from you and your office and are hereby acknowledging your one-third referral fee in these matters." Because the cases were being tried in Ohio, defendant sought the assistance of an Ohio law firm.

When the Ohio firm demanded 20% of the contingent fee earned in the case, Sherbow agreed to have his referral fee lowered to 20% as well. Danzig memorialized that new agreement in a letter dated January 2, 2014, which specifically noted that Sherbow was to receive 20% of the contingent fee for his referral of the cases.

Eventually, defendant was successful in its representation of the clients, obtaining an award of $10,225,000, out of which a contingent fee of $3,408,333.34 was paid to defendant. When defendant refused to pay 20% of that fee, or $681,666.67, to Sherbow, plaintiff brought the instant litigation, asserting a claim of breach of contract. Defendant moved for summary disposition three separate times, arguing, among other things, that the referral-fee contract violated MRPC 1.5(e), and thus was unenforceable, and that Danzig did not have the authority to bind defendant to a contract with plaintiff. With respect to a violation of MRPC 1.5(e), defendant provided evidence from Dion, Mervie, Dixon, and Hill that they were not aware of the referral-fee agreement and that even if they had been aware of it, they would have objected. Plaintiff countered with evidence from Sherbow and Danzig that the clients were informed and did not object. Further, plaintiff argued that Danzig had the apparent authority to bind defendant because Danzig was a named partner, appeared on the firm's letterhead, and was the head of defendant's intake department. The trial court agreed with plaintiff and denied the motions for summary disposition.

The case then proceeded to trial, largely focused on the issues of whether Danzig had the actual or apparent authority to bind defendant to the referral-

fee contract and, if so, whether the contract violated MRPC 1.5(e) and thus was unenforceable as a matter of public policy. After three days of testimony, the trial court, over plaintiff's repeated objections, instructed the jury that plaintiff had to prove by a preponderance of the evidence that MRPC 1.5(e) had not been violated and that, in order for plaintiff to be entitled to judgment, Sherbow had to have had attorney-client relationships with Dion on behalf of Charles's estate, Mervie, Dixon, and Hill at the time of the referral. The verdict form, to which plaintiff also objected, asked the jury to answer two questions with respect to each client: "Were any of the following clients of Jeffrey Sherbow," and "[i]f yes to any part of 1, did Plaintiff refer one, some, or all of the following personal injury cases to Defendant?" The verdict form then had a third, general question: "If yes to any parts of 1 and 2, did Jeffrey Danzig have actual or apparent authority to bind Fieger Firm?"

The jury answered that Sherbow had an attorney-client relationship with Dion on behalf of Charles's estate and actually referred that case to defendant. The jury found the opposite for the other three clients. As for the third question, the jury determined that Danzig did have the actual or apparent authority to bind defendant to a contract. Thus, the trial court entered judgment in favor of plaintiff with respect to the contingent fee earned for Charles's estate, awarding plaintiff $93,333.33, and for no cause of action for the remaining three claims. Plaintiff moved for judgment notwithstanding the verdict (JNOV) with respect to the fees arising from Dixon's case, arguing that Dion acted on behalf of both Charles's estate and Dixon while she was in the coma. The trial court denied that motion. This appeal followed.

II. SUMMARY DISPOSITION

Defendant argues that the trial court should have granted its motion for summary disposition. We disagree.

A. STANDARD OF REVIEW

"This Court . . . reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper when there is no "genuine issue regarding any material fact." *Id*. "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Id*. at 121. Similarly, a trial court's "construction of the rules of professional conduct" is a legal issue that this Court reviews de novo. *Grievance Administrator v Fieger*, 476 Mich 231, 240; 719 NW2d 123 (2006). A trial court's decision regarding the existence of a contract is a question of law that we review de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact . . . ." *St Clair*

Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n, 458 Mich 540, 556-557; 581 NW2d 707 (1998) (quotation marks and citation omitted).

B. VIOLATION OF MRPC 1.5(e)

Defendant argues that there was no question of fact that the referral-fee contract violated MRPC 1.5(e) and was therefore unenforceable as a matter of public policy. We disagree.

1. APPLICABLE LAW

"[A] contract is an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties . . . ." *In re Mardigian Estate*, 312 Mich App 553, 562; 879 NW2d 313 (2015) (quotation marks and citation omitted), aff'd 502 Mich 154 (2018). "Before a contract can be completed, there must be an offer and acceptance." *Clark v Al-Amin*, 309 Mich App 387, 394; 872 NW2d 730 (2015) (quotation marks and citation omitted). "In order for there to be an enforceable agreement between the parties, there must be 'mutual assent' to be bound—that is, the parties must have a 'meeting of the minds' on all the essential elements of the agreement." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 508; 853 NW2d 481 (2014).

"Parties are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy." *Edmore Village v Crystal Automation Sys, Inc*, 322 Mich App 244, 263; 911 NW2d 241 (2017). "[A]bsent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good." *Terrien v Zwit*, 467 Mich 56, 70; 648 NW2d

602 (2002). As this Court has held, Michigan courts apply "the fundamental principle that contracts that violate our ethical rules violate our public policy and therefore are unenforceable." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002). "[C]ontracts containing performance requirements that would violate the MRPC are not enforceable because such contracts contradict Michigan's public policy." *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003).

Defendant contends that the referral-fee contract between it and plaintiff violated MRPC 1.5(e). "The rules of statutory construction also apply to rules promulgated by the Michigan Supreme Court, such as the Michigan Court Rules (MCR), the MRPC, and the SBR [Rules Concerning the State Bar of Michigan]." *Morris & Doherty*, 259 Mich App at 44.[1] We begin with the plain language of MRPC 1.5(e), which states that "[a] division of a fee between lawyers who are not in the same firm may be made only if . . . the client is advised of and does not object to the participation of all the lawyers involved; and . . . the total fee is reasonable."

2. ANALYSIS

The parties primarily disagree about the meaning of "advised of and does not object to" in MRPC 1.5(e).

[1] This Court recently restated the proper procedure for such interpretation:

> [W]e look to the plain language of the . . . rule in order to ascertain its meaning and the intent of the rule must be determined from an examination of the . . . rule itself and its place within the structure of the . . . [r]ules as a whole. If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written. [*Sanders v McLaren-Macomb*, 323 Mich App 254, 266-267; 916 NW2d 305 (2018) (citations and quotation marks omitted).]

Defendant argues that the rule requires proof that the client actually affirmatively consented to the agreement after being informed of it. Plaintiff, meanwhile, argues that the rule requires only proof that the client was informed of the agreement and remained silent. Plaintiff is correct. The words used in MRPC 1.5(e) are clear and unambiguous; MRPC 1.5(e) requires only that the client be "advised of" a referral-fee agreement and then "does not object" to it. A lack of objection by the client, as required by the rule, does not mean that the client has to affirmatively approve of the agreement. If the drafters of MRPC 1.5(e) wished to require that the client give their affirmative consent to a referral-fee agreement, they would have written that requirement into the rule. As it now stands, the rule unambiguously only requires that the client be advised of and not object to the referral-fee agreement. *Id*.

Thus, summary disposition properly was denied because there was a genuine issue of material fact regarding whether the clients were aware of the fee-split agreement and did not object to it. MRPC 1.5(e). Defendant suggests that it submitted evidence in the form of affidavits, letters, and deposition testimony from the clients providing that they were not told of the fee-split agreement, and, had they been, they would have objected.[2] However, Sherbow and Danzig, who

[2] Defendant claimed at oral argument that Sherbow could not have referred all the clients because Mervie testified that she called defendant's office of her own accord on July 17, 2012. However, Sherbow testified that he learned Dion wished to speak with him on July 13, 2012. Sherbow then spoke to Danzig that same day. After speaking with Dion, Sherbow began the referral process on July 14, 2012. Among those whom Sherbow claims he included in that referral were Charles's estate, Dixon, Hill, and Mervie. Further, Danzig testified that he contacted Mervie for the first time using a telephone number provided by Sherbow. Thus, there still is a question of fact regarding the origin of the referral.

both attended the meeting on July 26, 2012, averred and testified that Danzig did advise Dion and Mervie of the fee-split agreement, to which they did not object. Further, Danzig averred and testified that he told Hill and Dixon about the same agreement and that neither of them objected. Thus, there was a genuine issue of material fact regarding the relevant inquiry. MRPC 1.5(e). Consequently, summary disposition properly was denied. *Maiden*, 461 Mich at 120.[3]

C. APPARENT AUTHORITY OF DANZIG

Defendant also argues that the trial court should have granted its motion for summary disposition be-

[3] Defendant contends that we should consider Howard Linden, not Dion, as the client with respect to Charles's estate for purposes of MRPC 1.5(e). We decline to consider this argument for several reasons. First, defendant's cross-appeal was limited to the trial court's opinion and order regarding summary disposition, in which the trial court did not actually address defendant's contention that Linden properly was considered the client. See *Elahham v Al-Jabban*, 319 Mich App 112, 120; 899 NW2d 768 (2017) (holding that an issue is unpreserved and need not be considered when "the trial court did not directly address and decide the . . . issue raised"). Second, the trial court actually addressed the issue during jury instructions, when it decided to instruct the jury that Dion was considered the client with respect to Charles's estate. Defendant neither recognizes that decision by the trial court nor mentions anything regarding its argument that Linden actually was the client in its statement of questions presented. Instead, defendant only asserts that the trial court erred in deciding the motion for summary disposition. See *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 517; 838 NW2d 915 (2013) ("A party abandons an issue when it fails to include the issue in the statement of questions presented in its appellate brief . . . ."). Third, we note that defendant's argument that Linden actually was the client for purposes of MRPC 1.5(e) is belied by defendant's own behavior. To wit, throughout discovery, defendant only provided one retainer agreement for its representation of Charles's estate—the one signed by Dion. Thus, it is clear that defendant considered Dion to be the legal representative of Charles's estate, given that a contingent-fee agreement, such as the one at issue in this case, must be in writing. Absent the contract signed

cause there was no question of fact that Danzig did not have the authority to bind defendant to the referral-fee contract. We disagree.

1. APPLICABLE LAW

"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal." *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 734; 276 NW 849 (1937) (quotation marks and citation omitted). More specifically, "[a]n agency is defined as a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 559; 847 NW2d 679 (2014) (quotation marks and citation omitted). With respect to agencies, "we consider 'the relations of the parties as they in fact exist under their agreements or acts' and note that in its broadest sense agency 'includes every relation in which one person acts for or represents another by his authority.' " *St Clair Intermediate Sch Dist*, 458 Mich at 557, quoting *Saums v Parfet*, 270 Mich 165, 170-171; 258 NW 235 (1935). "[F]undamental to the existence of an

by Dion, defendant has provided no written contract with Linden or any other party related to the estate. If there is no written contract with Linden, defendant's relationship with him—if he indeed, as claimed, was defendant's client—appears to be inconsistent with MRPC 1.5(c), which states that "[a] contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined." Fourth, and finally, at the time defendant signed a retainer agreement with Dion on behalf of Charles's estate, Linden had not yet been appointed as the personal representative of the estate. Consequently, at the time the bargain was struck between plaintiff and defendant regarding the referral fee, both plaintiff and defendant were treating Dion as the client with respect to Charles's estate.

agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him." *St Clair Intermediate Sch Dist*, 458 Mich at 557-558 (citation omitted).

"The authority of an agent to bind a principal may be either actual or apparent." *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). "Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses." *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). "Actual authority of an agent may be implied from the circumstances surrounding the transaction at issue." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). "These circumstances must show that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal." *Id*. "Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent." *Alar*, 208 Mich App at 528.[4]

2. ANALYSIS

On cross-appeal, defendant argues that the trial court should have granted summary disposition in its

[4] The Michigan Supreme Court provided the following relevant summary of law involving apparent authority:

> "Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position, and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results which replaces that actually conferred as the basis for determining rights and liabili-

favor on the issue of Danzig's apparent or actual authority to bind defendant to the referral contract. In the trial court and now on appeal, the parties' arguments center on the issue of Danzig's apparent authority. When arguing the summary-disposition motion, defendant provided evidence that it had a policy barring any partner or employee from agreeing to pay referral fees without the express approval of Geoffrey Fieger. In response, plaintiff provided evidence that Danzig had such authority, exercised it often, and almost never got approval from Fieger. In determining whether summary disposition was warranted, a trial court is required to consider "all surrounding facts and circumstances" to determine "whether an ordinarily prudent person, conversant with" the business in question, "would be justified in assuming" that Danzig "had the authority to" enter into the relevant contract on defendant's behalf. *Meretta*, 195 Mich App at 699. The inquiry must focus on the actions of defendant when determining whether Danzig had apparent authority. *Alar*, 208 Mich App at 528.

Defendant argues that the trial court erred by relying on the statements and actions of Danzig in finding that there was a question of fact regarding

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ties. The measure of authority consists of those powers which the principal has thus caused or permitted the agent to seem to possess, whether the agent had actual authority being immaterial if his conduct was within the apparent scope of his powers; the question involved is no longer what authority was actually given or was intended by the parties to the agency agreement, but resolves itself instead into the determination of what powers persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe him to have on the basis of the principal's conduct. Absence of intention to confer any power of the character of that exercised cannot be asserted so as to avoid or vitiate the authority, for the agent's authority as to those with whom he deals is what it reasonably appears to be." [*Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957), quoting 2 CJS, Agency, § 96, pp 1210-1211.]

Danzig's apparent authority. While defendant claims that it did nothing to establish a third party's reasonable belief in Danzig's apparent authority, the record shows otherwise. First, defendant made Danzig a partner in the law firm, which reasonably suggests to those dealing with Danzig that he acted on behalf of defendant. Second, defendant decided to put Danzig's name in the title of the firm, which is listed on the firm's letterhead. Thus, those dealing with Danzig via written correspondence, as was the case here, could reasonably have believed that defendant had designated Danzig as an agent to make contracts on behalf of defendant. Third, defendant named Danzig as the head of the intake department. Therefore, in addition to being a named partner and appearing on the letterhead, defendant also cloaked Danzig in apparent authority by appointing him as the head of the department that was most particularly involved here—the intake department. Based on that evidence, a reasonable jury could determine (and did in this case) that, given defendant's actions and assertions, a third party could reasonably have believed that Danzig had the authority to enter into the given contract. See *id*. The fact that defendant had an internal policy that any referrals had to be approved by Fieger does not affect our conclusion because the inquiry properly is focused on Danzig's apparent, rather than actual, authority. See *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957).

The trial court properly denied defendant's motion for summary disposition because there was a genuine issue of material fact regarding whether Danzig had the apparent authority to bind defendant to the relevant contract.

III. EVIDENCE

Plaintiff argues that the trial court abused its discretion when it allowed Mervie, Dixon, and Hill to

testify about objections to the referral-fee agreement that occurred after the time they were informed of it.

A. STANDARD OF REVIEW

This Court recently restated the proper standard of review for evidentiary issues such as those presented here:

> The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. However, preliminary questions of law, including the interpretation and application of statutes and legal doctrines, are reviewed de novo, and the trial court necessarily commits an abuse of discretion if it makes an incorrect legal determination. [*Peterson Estate v Brannigan Bros Restaurants & Taverns, LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018) (quotation marks and citations omitted).]

B. APPLICABLE LAW AND ANALYSIS

"To be admissible, evidence must be relevant." *Rock v Crocker*, 499 Mich 247, 256; 884 NW2d 227 (2016), citing MRE 402. "Relevant evidence is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Rock*, 499 Mich at 256, quoting MRE 401. At issue here was whether the clients knew of the referral-fee agreement and did not object, so as to conform to the mandates of MRPC 1.5(e).

Plaintiff posits that the only objection relevant to the case is an objection by the clients made at the time they were informed of the agreement. Therefore, plaintiff argues, the trial court should have barred the

clients from testifying about any objections to the referral fee that arose *after* the agreement was made. While plaintiff is correct that defendant was required to prove that the clients objected to the referral-fee agreement at the time they were informed, that does not render a later objection entirely irrelevant so as to be inadmissible. The United States District Court for the Eastern District of Michigan has provided persuasive analysis on the issue of when clients must object pursuant to MRPC 1.5(e):

> The rule does not specify when objections to a lawyer's participation must be lodged. Nor does the interpretive ethics opinion provide guidance on this issue; rather, pointing to other ethics rules, the opinion focuses on the type of advice that must be given by both the referring and receiving lawyer, such as "who will be working on the case, what services each lawyer will render to the client, and who is responsible for the matter." [State Bar of Michigan Ethics Opinion] RI–234, at 2 (1995).
>
> Since a fee agreement is a contract, obligations became fixed once there was a meeting of the minds. *See Port Huron Ed. Assoc. v. Port Huron Area School Dist.*, 452 Mich. 309, 326-327; 550 N.W.2d 228, 238-39 (1996) (binding contract created when there is meeting of the minds; meeting of the minds likewise required to modify or cancel contract); *Groulx v. Carlson*, 176 Mich.App. 484, 491, 440 N.W.2d 644, 648 (1989). To allow subsequent events, such as a mere change of heart, to upset the referral arrangement is inconsistent with basic contract law. *Port Huron Ed. Assoc.*, 452 Mich. at 326-327, 550 N.W.2d at 238-39. Further, it would be unwise as a matter of policy to permit a client by whim or fancy, or perhaps more nefarious motives, to undo a referral contract after the lawyers' work is finished but before final payment. [*Idalski v Crouse Cartage Co*, 229 F Supp 2d 730, 738-739 (ED Mich, 2002).]

We find this analysis to be persuasive. Plaintiff is correct that the clients must have objected at the time

they were informed of the agreement in order for there to be a violation of MRPC 1.5(e). See *Idalski*, 229 F Supp 2d at 738-739.

However, later objections are not irrelevant and inadmissible. First, looking at the analysis in *Idalski*, later objections were not deemed irrelevant. The *Idalski* court only concluded that an objection had to occur at the time the client was informed of the agreement in order for the contract to violate MRPC 1.5(e) and be rendered unenforceable. In a case like this, the later objections remain relevant. At trial, Danzig testified that he informed all the clients of the referral-fee agreement and that they did not object. Sherbow agreed with respect to the July 26, 2012 meeting that he attended. Mervie, Hill, and Dixon, however, testified that they did not believe they had been informed of the referral-fee agreement, because they could not specifically remember the conversation that had taken place more than four years before trial, but that if they had been informed they would have objected.

While the clients' objection at trial could not invalidate the contract pursuant to MRPC 1.5(e), it does make it more likely that the clients *were not* informed of the referral-fee agreement. Obviously, a person cannot object to information that he or she did not receive. Therefore, when the clients testified that they either were not informed or did not remember being informed of the referral-fee agreement, it was only logical that they did not object at the time. Accordingly, their failure to remember objecting to or being informed of the agreement in 2012 and their testimony that they believed they would have objected if informed make it more likely that they were not informed. That testimony is relevant because had the jury believed the clients' assertion that they would have objected if

informed but did not object at the time, then it would be logical to infer that they must not have been informed. Therefore, while the objections to the referral-fee agreement at the time of trial were not relevant to whether the clients objected at the time they were informed, those objections *were* relevant to whether the clients in fact were informed.

Because the clients' testimony " 'ma[de] the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence,' " it was admissible. *Rock*, 499 Mich at 256, quoting MRE 401. The challenged evidence was relevant and admissible, and the trial court did not abuse its discretion by admitting it at trial. See *Peterson Estate*, 323 Mich App at 571. However, given the limited relevance of the testimony, the trial court should consider any request for a limiting instruction regarding the evidence made by plaintiff during any retrial.

IV. JURY INSTRUCTIONS AND VERDICT FORM

Plaintiff argues that it is entitled to a new trial because the trial court made prejudicial legal errors when instructing the jury and approving the proposed verdict form. We agree.

A. STANDARD OF REVIEW

"We review de novo properly preserved instructional errors . . . ." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 626; 792 NW2d 344 (2010). "Whether the trial court's instruction on the applicable burden of proof was proper is a question law that this Court reviews de novo." *Stein v Home-Owners Ins Co*, 303 Mich App 382, 386-387; 843 NW2d 780 (2013). We

"consider the jury instructions as a whole to determine whether they adequately present the theories of the parties and the applicable law." *Alpha Capital*, 287 Mich App at 626-627. "Instructional error warrants reversal when it affects the outcome of the trial." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 680; 819 NW2d 28 (2011), citing MCR 2.613(A). Stated differently, "a verdict should not be set aside unless failure to do so would be inconsistent with substantial justice." *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

B. BURDEN OF PROOF

Plaintiff argues that the trial court committed error requiring reversal by instructing the jury that plaintiff had the burden of proof with respect to defendant's affirmative defense that the contract violated MRPC 1.5(e). We agree.

1. APPLICABLE LAW

Pursuant to MCR 2.111(F)(3)(a) and (b), an argument "that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery" or "that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part," is an affirmative defense. More generally, " '[a]n affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff.' " *Detroit Edison Co v Stenman*, 311 Mich App 367, 382; 875 NW2d 767 (2015), quoting *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). " '[I]t is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's

prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings.' " *Detroit Edison Co*, 311 Mich App at 382, quoting *Stanke*, 200 Mich App at 312.

2. ANALYSIS

In this case, defendant and plaintiff had a written contract that required defendant to pay plaintiff 20% of the contingent fee defendant earned in the litigation involving Mervie, Dixon, and Hill. Although defendant challenged Danzig's authority to bind defendant to that contract, the jury explicitly disagreed. Therefore, under applicable agency and contract law, defendant and plaintiff had a contract. Defendant's alternate argument, which is at issue here, was that the contract should be found unenforceable as violative of Michigan's public policy. Defendant contends that the contract violated public policy because it was made without fully complying with MRPC 1.5(e), which required the clients to be informed of the referral-fee agreement and to not object. Defendant sought "to avoid the legal effect" of the contract on public-policy grounds, MCR 2.111(F)(3)(b), or to establish "that [the contract was] void [or] voidable," MCR 2.111(F)(3)(a). Pursuant to MCR 2.111(F)(3), such an argument is an affirmative defense because it "is a defense that does not controvert . . . plaintiff's establishing [that] a prima facie [contract exists], but that otherwise denies relief to . . . plaintiff." *Detroit Edison Co*, 311 Mich App at 382 (quotation marks and citation omitted).

For affirmative defenses, "a party must assert [them] and has the burden of providing evidence in support." *Williamstown Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 552; 927 NW2d 262 (2018),

citing *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). "Only after such evidence has been introduced does the burden shift to the plaintiff to produce clear and decisive evidence to negate the defense." *Williamstown Twp*, 325 Mich App at 552 (quotation marks and citation omitted). Thus, pursuant to the Michigan Court Rules and established caselaw, defendant was required to bear the burden of proof with respect to its affirmative defense. See *id*.; MCR 2.111(F)(3).

Defendant argues that to prove a contract, a party is required to prove that the contract involved a legal subject matter. It is true that one element of a valid contract is that the contract is in regards to "a proper subject matter." *Innovation Ventures*, 499 Mich at 508 (quotation marks and citation omitted). However, defendant does not actually contend that the "subject matter" of the contract is illegal, because MRPC 1.5(e) specifically contemplates that referral fees between lawyers are legal, except under certain circumstances. See generally *Morris & Doherty*, 259 Mich App 38. Instead, defendant's argument is that the specific contract in question was unenforceable as violative of public policy because it failed to comply with MRPC 1.5(e).[5] Accordingly, the trial court erred by instructing the jury to the contrary.

C. ATTORNEY-CLIENT RELATIONSHIP REQUIREMENT

Plaintiff also argues that the trial court erred when it instructed the jury that Mervie, Hill, and Dixon

[5] Longstanding caselaw establishes that such arguments are affirmative defenses for which a defendant bears the burden of proof. See *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000); see also *Rothschild v Schneider*, 167 Mich 501, 503-506; 133 NW 530

must have had an attorney-client relationship with Sherbow before being referred to defendant in order to satisfy the requirements of MRPC 1.5(e). We agree.

1. APPLICABLE LAW

MRPC 1.5(e) provides that "[a] division of a fee between lawyers who are not in the same firm may be made only if . . . *the client* is advised of and does not object to the participation of all the lawyers involved; and . . . the total fee is reasonable." (Emphasis added.) Considering the plain language of the rule, as this Court must, *Sanders*, 323 Mich App at 266-267, a contract for a referral fee violates MRPC 1.5(e) and is thus unenforceable as against public policy unless a client has been advised of the agreement and did not object.

2. ANALYSIS

Defendant contends, and the trial court agreed at trial, that use of the word "client" in MRPC 1.5(e) means that Dixon, Mervie, and Hill had to be Sherbow's clients in order to conform to the rule. Plaintiff argues to the contrary, alleging that the term "client" means that the person would eventually become the client of the firm or lawyer receiving the referral. We agree with plaintiff. This Court's goal is to discover the intent of the Michigan Supreme Court in drafting the rule and to use the language of the rule, as a whole, to determine that intent. *Sanders*, 323 Mich App at 266-267; *Morris & Doherty*, 259 Mich App at 44. As this Court has held, "MRPC 1.5(e) is designed to prohibit brokering, to protect a client from clandestine payment and employ-

(1911); see also *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 576-577; 485 NW2d 129 (1992); see also *Cheff v Terpstra*, 7 Mich App 141, 145; 151 NW2d 208 (1967) (holding that "illegality [of contract] is an affirmative defense in Michigan").

ment, and to prohibit aggrandizement of fees." *McCroskey, Feldman, Cochrane & Brock, PC v Waters*, 197 Mich App 282, 286-287; 494 NW2d 826 (1992).

Requiring a party to establish an attorney-client relationship with the referring attorney before a referral takes place adds a new element to the rule and is not part of MRPC 1.5(e) as it is written. See *id*. at 286-287. The requirement to advise the person of the referral-fee split and allow them to object destroys the ability of attorneys to engage in clandestine payments to one another and impairs brokering by allowing the potential client to object to the referral fee. *Id*. As to *Waters*'s concern with "prohibit[ing the] aggrandizement of fees," the client requirement proposed by defendant likely would have the opposite effect, encouraging attorneys to engage in billable work with the person being referred so as to firmly ensure that an attorney-client relationship has been established. *Id*. at 287. After all, as our Supreme Court has held, an attorney-client relationship typically is not formed until an attorney "render[s] . . . legal advice and legal services . . . and the client[] reli[es] on that advice or those services . . . ." *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 11; 564 NW2d 457 (1997).

This additional requirement also has the potential to result in situations in which attorneys who typically would immediately refer a case that they knew they were not qualified or adequately able to handle might retain the case for a certain period of time. In so doing, those underqualified or underprepared attorneys might cause a detriment to the injured party's case. After all, Michigan law with respect to personal-injury cases often has exacting statutory requirements (including, for example, the requirements for medical-malpractice and no-fault cases and the requirements

for cases implicating governmental immunity) that an attorney not versed in that area of law might unwittingly fail to meet. Thus, the Michigan Supreme Court wrote MRPC 1.5(e) in a manner that protects clients from the aforementioned dangers by requiring attorneys who will be representing the client to inform the client of the referral fee and to allow for objection. See *Waters*, 197 Mich App at 286-287. Interpreting the rule's use of the word "client" as suggested by defendant and the trial court would add a requirement not explicitly listed in MRPC 1.5(e) and would work to undermine the overriding purpose of the rule, which is to protect clients. See *id*.[6]

In fact, allowing defendant to misconstrue the rule and then use it to void a contract into which it willingly entered would be a plain misapplication of the MRPC in general. To wit, in the preamble of the MRPC, in the section regarding the scope of the rules, the drafters warned that "the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons." MRPC 1.0, preamble.

In sum, MRPC 1.5(e) does not require that Sherbow have an attorney-client relationship with Mervie, Dixon, and Hill. The trial court erred when it instructed the jury to the contrary and included the question on the verdict form.[7]

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[6] For example, in *Waters*, 197 Mich App at 287, in considering a case in which two attorneys disputed the share of a contingent fee already paid, this Court reasoned that the dangers from which MRPC 1.5(e) sought to protect clients was only tangentially applicable: "Plainly, none of these concerns is implicated in this case. The agreement is simply a mechanism for dividing an already existing fee. In other words, this is not a referral situation contemplated by the rule."

[7] Although a Michigan appellate court has not yet analyzed the word "client" in MRPC 1.5(e), the Kansas Supreme Court did so and reached the same conclusion. Despite lacking precedential value, the Kansas Supreme Court's reasoning in analyzing its identical rule is particularly persuasive:

D. REVERSAL IS REQUIRED

Errors regarding jury instructions and jury verdict forms only require reversal when they "affect[] the outcome of the trial." *Hardrick*, 294 Mich App at 680, citing MCR 2.613(A). Additionally, the Michigan Supreme Court has held that erroneous jury instructions require reversal when they "effectively relieved [a party] of [its] burden of proof and [were] not specific enough to allow the jury to decide the case intelligently, fairly, and impartially." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 15; 651 NW2d 356 (2002) (quotation marks and citation omitted).

The trial court committed two errors when providing jury instructions, and it provided a jury verdict form that was irredeemably deficient.[8] The issues tried were (1) whether Danzig had the actual or apparent author-

> MRPC 1.5(g) lists two requirements for a division of a fee between lawyers: (1) the *client* is advised and does not object; and (2) the total fee is reasonable. The word "client" could refer either to the status of a litigant with regard to the referring attorney or with regard to the attorney to whom the matter is referred. If it refers to the relationship with regard to the referring attorney, the rule mandates an attorney-client relationship with the referring attorney. It is clear that the litigant would be a client of the attorney to whom the matter is referred. We adopt what we believe to be the logical interpretation, that "client" refers to the status of the litigant with the attorney to whom the matter is referred.
>
> Under this construction of the rule and the facts of this case, although it would be preferable, MRPC 1.5(g) does not require that the referring attorney have an attorney-client relationship with the person referred. Of course, the attorney accepting the referral may impose such a requirement before agreeing to pay a referral fee. This referral relationship between counsel is a matter of contract between attorneys. [*Ryder v Farmland Mut Ins Co*, 248 Kan 352, 363; 807 P2d 109 (1991).]

We now hold similarly.

[8] Interestingly, the trial court reached the same conclusion before trial, holding that there was no legal support for requiring Sherbow to have an attorney-client relationship with Mervie, Dixon, and Hill, and

ity to bind defendant to the referral contract, (2) if so, whether the clients were informed about the referral fee, and (3) if they were informed, whether they objected. Despite that, the trial court instructed the jury that it had to determine whether Mervie, Hill, and Dixon were clients of Sherbow. The jury verdict form ordered the jury that if it found that the three individuals were not Sherbow's clients then plaintiff had no claim to its share of the attorney fees from Mervie's, Dixon's, and Hill's cases. The jury answered that there was no such relationship, thereby resulting in a verdict of no cause of action with respect to those three cases. Considering that the jury made a dispositive determination of plaintiff's claims against defendant on the basis of an unnecessary requirement, the error clearly affected the outcome of trial. See *Hardrick*, 294 Mich App at 680.

Plaintiff and defendant both note, however, that the jury continued to answer the second question in the negative as well, finding that Sherbow did not refer Mervie, Dixon, or Hill to defendant. Given the record provided and the issues that were to be tried, it is not clear what purpose the trial court had in asking that question but, presumably, the trial court was asking the jury to determine if there was consideration for the written referral-fee contract. Assuming the trial court was attempting to determine whether there was an enforceable contract based on an actual referral, we believe it is relevant to consider each element on which the jury was instructed to reach a verdict to determine the existence of a contract. The trial court instructed the jury that in order for an enforceable, binding

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that defendant was to bear the burden of proving that MRPC 1.5(e) was violated. Yet, at trial, the trial court reversed course and instructed the jury to the exact opposite.

contract to exist, plaintiff had to prove by a preponderance of the evidence that Mervie, Dixon, and Hill were aware of the referral-fee agreement and did not object to it. As discussed, defendant actually bore the burden to prove the opposite: that the clients were not informed or did object. Thus, given the instructions the jury was provided, the jury was required to answer the second question on the verdict form in the negative if it found that plaintiff did not meet its burden of proving that MRPC 1.5(e) was not violated. Considering the trial court's confusing and improper instructions regarding MRPC 1.5(e) and the party bearing the burden of proof, defendant was "effectively relieved" of its burden of proof and, as a result, the jury was not allowed "to decide the case intelligently, fairly, and impartially." *Cox*, 467 Mich at 15 (quotation marks and citation omitted).

We vacate the jury's verdict with respect to the first two questions asked on the verdict form, and we remand for a new trial consistent with this opinion.

V. JNOV

Plaintiff argues both that the trial court erred by denying its motion for JNOV with respect to Dixon and that this Court should grant plaintiff JNOV with respect to Mervie. We disagree.

A. STANDARD OF REVIEW

This Court "reviews de novo a trial court's decisions regarding motions for JNOV." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016). "JNOV is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a

matter of law." *Nashal v Freemont Ins Co*, 324 Mich App 696, 719; 922 NW2d 662 (2018). "If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim [or defense], then the question is for the jury." *Id*. (quotation marks and citation omitted).

B. APPLICABLE LAW AND ANALYSIS

Once again, this argument focuses on the interpretation and analysis of MRPC 1.5(e). With respect to Dixon's case, plaintiff presents this particular argument on appeal based on the assumption that the trial court properly instructed the jury and a new trial is not required. Therefore, if plaintiff's argument has merit, a new trial would not be required with respect to plaintiff's claim to 20% of the fees from Dixon's case. Plaintiff's argument for JNOV relies on a series of presumptions, the first of which is that Dion entered into a contract for representation with defendant on behalf of Dixon, and thus, for purposes of MRPC 1.5(e), he was considered the "client" who had to be informed of the referral-fee agreement and not object. Plaintiff insists that the trial court erred by not applying the same logic to Dixon given its determination that Dion acted on behalf of Charles's estate and was considered the "client" under the rule. The trial court's ruling in that regard, however, is not pertinent to the issue presented here. The language of the rule is plain and unambiguous: the client must be advised of the referral-fee agreement and not object. MRPC 1.5(e). The record is not disputed that Dion agreed to defendant's representation of Dixon, his mother, at the July 26, 2012 meeting at defendant's office. Dion did so

because Dixon was in a medically induced coma at the time. However, Dixon eventually was brought out of the coma, regained consciousness, and was moved to a rehabilitation facility. While there, testimony at trial showed that Danzig came to visit her and explained defendant's legal representation of her. Danzig further testified that he informed Dixon of the referral-fee agreement and that she did not object to it. Dixon presented contrary testimony.

While Dion initially hired defendant on behalf of Dixon, Dixon clearly was given the opportunity to either ratify or exit that contract. As the record makes clear, Dixon approved of the hire. Dixon's acknowledgement that she approved of Dion's decision to retain defendant to represent her does not morph Dion into a "client" with respect to either the contract between defendant and Dixon or pursuant to MRPC 1.5(e). When Dixon recovered from her injuries and had a clear mind, she was told that defendant represented her in the litigation arising out of the automobile accident. At that point, she had the opportunity to terminate that representation and seek alternate counsel. Similarly, when she was informed about the referral-fee agreement—if she was—she also had the opportunity to object. Thus, with respect to Dixon, Dion was not considered the "client" pursuant to MRPC 1.5(e). Consequently, the jury's finding that Dion was Sherbow's client, that Sherbow referred him to defendant, and that Dion was aware of the referral-fee agreement and did not object did not require a judgment with respect to Dixon. If the jury believed that Dixon was not made aware of the referral-fee agreement when she ratified Dion's contract with defendant, then the contract violated MRPC 1.5(e) and was unenforceable as violative of public policy. *Morris & Doherty*, 259 Mich App at 58. Therefore, because

judgment in plaintiff's favor was not required as a matter of law based on the jury's findings of fact, the trial court properly denied plaintiff's motion for JNOV. *Nashal*, 324 Mich App at 719.

Next, plaintiff also argues that this Court should grant JNOV in its favor with respect to Mervie. Plaintiff readily admits on appeal that it did not raise this issue in the trial court. Therefore, this issue is not preserved for appeal, and we decline to consider it. *Elahham v Al-Jabban*, 319 Mich App 112, 120; 899 NW2d 768 (2017).

VI. CONCLUSION

We affirm the trial court's orders denying summary disposition and JNOV, vacate the jury's verdict with respect to the first two questions regarding Mervie, Hill, and Dixon, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., and SHAPIRO, J., concurred with RIORDAN, J.

PEOPLE v MILLER

Docket No. 338453. Submitted January 1, 2019, at Lansing. Decided January 15, 2019, at 9:05 a.m.

David J. Miller was convicted after a jury trial in the Macomb Circuit Court, Diane M. Druzinski, J., of one count of identity theft, MCL 445.651(a)(*i*), for using the name and Social Security number of his ex-wife, Robin Mayer, to obtain electrical service from DTE Energy (DTE) between 2013 and 2015. Defendant appealed.

The Court of Appeals *held*:

1. The trial court was not required to instruct the jury that it must find that defendant committed all the elements of the offense of identity theft on the day that he opened the account rather than within a range of dates encompassing the date on which the account was opened. If time is not an element of the charged offense, the prosecution need not prove the date and time of the offenses beyond a reasonable doubt, even though the information must identify the date and time of the offenses. Although the trial court instructed the jury that it was required to make a finding that the offense occurred within a specific time period, the prosecution was not actually required to prove the timing of the offense as an element of the crime of identity theft. The trial court's instructions properly reflected that, to find defendant guilty of identity theft, it must find that he had used Mayer's personal identifying information to obtain services with the intent to defraud.

2. The trial court did not err by instructing the jury that the offense occurred over a date range from September 3, 2013, through August 2015 or by failing to instruct the jury on a specific definition of "obtain." MCL 445.65 does not prohibit providing personal information to another in order to obtain services; rather, the statute prohibits a person from using or attempting to use the personal identifying information of another person to obtain services. Consulting a dictionary indicates that the verb "obtain" has only one modern definition, which is to gain or attain, usually by planned action or effort. Thus the word "obtain," in the context of the statute, can mean either to initially

receive a service or to continue to attain the service by use of the information. Therefore, even accepting defendant's argument that he did not provide DTE with Mayer's information, defendant attained the service through his continued use of Mayer's information. Accordingly, even if the trial court's instruction that the offense dates were September 3, 2013 through August 2015 led the jury to question the meaning of the word "obtain," its common dictionary definition encompassed both the initial receipt of service and the continued attainment of that service thereafter. Moreover, the trial court did not err by failing to specifically instruct the jury on the meaning of "obtain" because that term is generally familiar to lay persons and is susceptible to ordinary comprehension. Had defense counsel objected to the instructions on these grounds, those objections would have been futile, and counsel was not ineffective for failing to make futile objections.

3. The trial court did not plainly err by allowing the prosecution to amend the information to reflect the time period from September 2013 to August 2015, and defense counsel was not ineffective for failing to object to the amendment. Under MCL 767.45(1)(a) and (b), an information must inform the defendant of the nature of the offense charged and the time of the offense as near as may be; however, no variance as to time is fatal unless time is of the essence of the offense. A trial court should grant the prosecution's motion to amend an information unless amendment would result in unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. Defendant argues that the facts at preliminary examination and at trial only supported a finding for one alleged date of the identity theft—September 3, 2013. However, because time is not an element of the offense of identity theft, the variance in time was not fatal to the information. Moreover, defendant did not demonstrate that he suffered unacceptable prejudice from the amendment of the information, and defense counsel was not ineffective for failing to make a futile objection to the amendment.

4. The trial court did not err by allowing the prosecutor to make misstatements of the law that prejudiced defendant, nor was defense counsel ineffective for failing to object to those statements. Defendant challenged the prosecutor's statements that the jury could find defendant guilty of identity theft even if it found that he had not provided DTE with Mayer's information because he continued to receive and pay the bills using her name and Social Security number. However, under MCL 445.65, the jury could in fact have found defendant guilty without finding that he was the one who provided Mayer's personal information

when the account was opened. Further, any error was cured by the trial court's correct instruction on the applicable law. For the same reasons, defense counsel was not ineffective for failing to challenge these statements.

5. The evidence was sufficient to support defendant's conviction for identity theft. Defendant argues that there was no evidence presented that he gave Mayer's information to DTE; however, providing another's personal information to a utility or other service provider is not an element of the offense. Moreover, a DTE employee testified that the account in question could only have been created by someone providing Mayer's Social Security number over the phone. Defendant, as Mayer's ex-husband, would have had access to her Social Security number at some point, and defendant admitted to calling DTE to set up the account in September 2013. Although defendant denied having Mayer's Social Security number and testified that he believed that DTE had erroneously caused Mayer's information to be entered on his account, the jury was free to disbelieve defendant. Even accepting defendant's claim that he did not provide DTE with Mayer's information, there was sufficient evidence to establish that defendant used Mayer's information to obtain services because the prosecution established that defendant was aware that DTE services were provided to defendant's address under Mayer's information for several months, yet continued to avail himself of that service. Viewed in the light most favorable to the prosecution, there was enough evidence for a rational trier of fact to determine beyond a reasonable doubt that defendant was guilty of using Mayer's information to obtain services. There was also sufficient evidence of defendant's intent to defraud, which may be established by showing a defendant's imposition of loss on another. Mayer testified that she received past-due bills from DTE, that her credit was negatively affected by defendant's failure to pay in a timely fashion, and that a federal tax lien was placed on her home, although the home was in her new husband's name. Additionally, defendant paid the bills on the account and never sought to correct the account information; yet when Mayer terminated the service defendant was able to activate service in his own name that same day, suggesting that defendant knew that he could have rectified the situation if he had been so inclined. This evidence, viewed in the light most favorable to the prosecution, and with minimal circumstantial evidence being necessary to show intent, sufficed to allow a reasonable jury to conclude that defendant had the intent to defraud.

6. MCL 445.65(1) is not unconstitutionally vague, either for failure to give fair notice of what behavior it prohibits by failing to define the terms "use" or "obtain" or for permitting arbitrary enforcement. A statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Fair notice exists when the statute's meaning can be determined by referring to judicial interpretations, common law, dictionaries, treatises, or the common meanings of words, and both "obtain" and "use" are capable of being interpreted through the use of a dictionary or through common usage. Further, defendant's unsupported assertion that the statute permits arbitrary enforcement because billing problems are common is unpersuasive because the statute requires proof of the intent to defraud, which is the specific intent to cheat or deceive. Accordingly, the statute does not permit the conviction of persons who accidentally or innocently receive or pay for services meant for another.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Joshua R. Van Laan*, Assistant Prosecuting Attorney, for the people.

The Clark Law Office (by *Matthew R. Clark*) for defendant.

Before: BOONSTRA, P.J., and SAWYER and TUKEL, JJ.

BOONSTRA, P.J. Defendant appeals by right his conviction, following a jury trial, of one count of identity theft, MCL 445.65(1)(a)(*i*). The trial court sentenced defendant to serve one day in jail and 18 months' probation. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from defendant's use of his ex-wife's name and Social Security number to obtain electrical

service from DTE Energy (DTE) at an address located on Elm Lane in Harrison Township between 2013 and 2015. At trial, a DTE employee testified that DTE account numbers are assigned to individuals rather than to properties and that to obtain an account number, an individual must provide confidential information including his or her date of birth and Social Security number. That information is then verified through TransUnion (a company that provides credit checks) before establishing service. The DTE employee testified that a new account was opened in the name of defendant's ex-wife, Robin Mayer, for an address located on Elm Lane in Harrison Township in September 2013 (the Elm Lane account). Further, the account was associated with Mayer's Social Security number and could only have been opened by someone who was able to verify the confidential information over the phone.

Defendant admitted that the Elm Lane address was his address. He testified that he attempted to transfer his DTE service from his previous address to his new address in 2013 and that he provided his own Social Security number when he requested that the service be transferred. He denied knowing Mayer's Social Security number at the time he opened the account. However, he agreed that he had received and paid bills with Mayer's name on them.

Defendant testified that in 2002, several years after his divorce from Mayer, the name on his electric bills "randomly changed" to that of "Robin Miller," Mayer's name during their marriage, and that he was only able to change the account back into his own name after calling DTE over a period of eight months to a year. Defendant testified that he was never told why the name on his bill had changed. A DTE employee confirmed that there was another account with defendant

listed as the responsible party and using his Social Security number, but that nonetheless also reflected the name of "Robin Miller." The DTE employee testified that a person whose name and Social Security number were associated with an account could change the name on the account, but not the personal information used to verify the account, such as a Social Security number.

Mayer denied providing DTE with the information to open the Elm Lane account. She testified, and a DTE employee confirmed, that she informed DTE in 2015 that she had never lived at the Elm Lane address or requested service at that address, and she requested that the service at that address be shut off. After the service was shut off, defendant called DTE and had his service reinstated under his own account that same day. DTE had no record of defendant having ever contacted it about the name and information on the Elm Lane account. Mayer testified that she had received two past-due bills for the Elm Lane account. Defendant eventually told her via text message that he had paid one of the bills, stating, "I have purchased a money order for $107. Will go in Tuesday's mail. I have never received a bill for any open payment, only bills ever received [sic] . . . ." Defendant testified that he never received a "final bill" for the account after the shutoff, because Mayer had asked for all correspondence related to the Elm Lane account to be forwarded to her.

After the close of proofs, the trial court discussed the proposed jury instructions with the prosecutor and defendant's counsel. Defendant's counsel answered affirmatively when the trial court asked whether he was "satisfied" with the instructions. The trial court instructed the jury regarding the elements of identity theft and stated that "[t]he prosecutor must also prove

beyond a reasonable doubt that the crime occurred on or about September 3, 2013, through August 2015 in Macomb County." During deliberations, a note from the jury asked the trial court to define the word "obtain" in the context of the jury instructions on the elements of the offense. After meeting with counsel, the trial court instructed the jury: "There is no definition for obtain in the jury instructions. Please use your general knowledge and every day experience in the affairs of life to help you defined [sic] obtain." Defense counsel agreed on the record to the language of the trial court's response.

The jury convicted defendant as described. Defendant subsequently moved for a new trial, *Ginther*[1] hearing, or judgment of acquittal notwithstanding the verdict, arguing that his defense counsel was ineffective for failing to make several objections, that his conviction was based on insufficient evidence, and that MCL 445.65(1)(a)(*i*) was unconstitutionally vague. The trial court denied defendant's motions.

This appeal followed.

II. JURY INSTRUCTIONS

Defendant argues that the trial court erred in two respects when instructing the jury: (1) by failing to properly instruct the jury regarding the date and time of the offense for which defendant was charged, and (2) by failing to properly instruct the jury on the correct definition of the word "obtain," as used in the jury instruction regarding the elements of identity theft. Defendant also argues that his counsel was ineffective for failing to object to these instructions. We disagree.

We review for plain error an unpreserved challenge to the trial court's jury instructions. See *People v Carines*,

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

460 Mich 750, 764-765; 597 NW2d 130 (1999). An error is plain if it is "clear or obvious," and it affects substantial rights if it "affected the outcome of the lower court proceedings." *Id*. at 763. This Court reviews de novo issues of statutory interpretation. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). A defendant's ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When reviewing a claim of ineffective assistance of counsel, this Court reviews for clear error a trial court's findings of fact and reviews de novo questions of law. *Id*. When no *Ginther* hearing was held, this Court's review is limited to mistakes apparent from the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

A defendant may waive his or her challenge to jury instructions. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Waiver extinguishes any error, leaving nothing for this Court to review. *Id*. at 216. A defendant waives an issue by expressly approving of the trial court's action. *Id*. When the trial court asks whether a party has any objections to the jury instructions and the party responds negatively, it is an affirmative approval of the trial court's instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

In this case, defense counsel expressly affirmed that he had no objections to the trial court's jury instructions. Defendant has therefore waived this issue. Notwithstanding this waiver, we also find no plain error in the instructions.

A. DATE AND TIME OF OFFENSE

Defendant argues that the trial court should have instructed the jury that it must find that defendant

committed all the elements of the offense of identity theft on the day that he opened the account, rather than within a range of dates encompassing the date on which the account was opened. We disagree.

"A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). A defendant is entitled to have the elements of the crime submitted to the jury in a way that is "neither erroneous nor misleading[.]" *Id*. (quotation marks and citation omitted). However, "an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Id*. at 501-502.

This Court has stated that if time is not an element of the charged offense, the prosecution need not prove the date and time of the offense beyond a reasonable doubt even though the felony information must identify the date and time of the offense. *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007). The criminal statute at issue in this case, MCL 445.65, provides in relevant part:

> (1) A person shall not do any of the following:
>
> (a) With intent to defraud or violate the law, use or attempt to use the personal identifying information of another person to do either of the following:
>
> (*i*) Obtain credit, goods, services, money, property, a vital record, a confidential telephone record, medical records or information, or employment.

The trial court instructed the jury as follows:

> The defendant is charged with a crime of using the personal identifying information of another person to

> obtain services. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant used the personal identifying information of Robin formally [sic] known as Miller Mayer [sic]. Second, that the defendant did this with the intent to obtain services. Third, that the defendant did this with the intent to defraud. When I say someone must act with intent to defraud, I mean act to cheat or deceive, usually to get money, property or something else valuable or to make someone suffer such a loss. The prosecutor must also prove beyond a reasonable doubt that the crime occurred on or about September 3, 2013, through August 2015 in Macomb County.

Although the trial court instructed the jury that it was required to make a finding that the offense occurred within a specific time period, the prosecution was not actually required to prove the timing of the offense as an element of the crime of identity theft. *Dobek*, 274 Mich App at 82-83. The trial court's instructions properly reflected that, to find defendant guilty of identity theft, the jury must find that he (1) used Mayer's personal identifying information, (2) to obtain services, (3) with the intent to defraud. On the whole, the trial court's instructions submitted the essential elements of the crime to the jury in a way that was not confusing, erroneous, or misleading. *Kowalski*, 489 Mich at 501.

B. DEFINITION OF "OBTAIN"

Defendant argues that the instruction regarding the range of dates, combined with the trial court's refusal to instruct the jury on a specific definition of "obtain," led the jury to mistakenly conclude that it could find that defendant committed the offense of identity theft when defendant continued to receive services from the Elm Lane account, even if it believed that he had not initially provided Mayer's personal information to

DTE. We disagree, because the jury was permitted to conclude that defendant committed identity theft even if it did not conclude that he provided Mayer's personal information to DTE in September 2013.

This Court interprets statutes on the basis of their plain and ordinary language. *Williams*, 475 Mich at 250. We may consult a dictionary to determine the meaning of undefined statutory terms. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). When doing so, we must "determine the most pertinent definition" in light of the word's context in the statute. *People v Hershey*, 303 Mich App 330, 342; 844 NW2d 127 (2013) (quotation marks and citation omitted).

MCL 445.65 does not state that it is illegal to *provide* personal information to another in order to obtain services. Rather, the statute provides that a person shall not "*use* or attempt to use the personal identifying information of another person . . . [to] [*o*]*btain* . . . services . . . ." MCL 445.65(1)(a)(*i*) (emphasis added). The word "obtain" is not defined in the identity-theft statute. See MCL 445.65. Consulting a dictionary indicates that the verb "obtain" has only one modern definition, which is "to gain or attain usu[ally] by planned action or effort[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). The question thus is whether defendant used Mayer's information to gain or attain services, not whether defendant was the person who gave Mayer's information to DTE upon the opening of the account. In other words, the word "obtain," in the context of the statute, can mean either to initially receive a service or to continue to attain the service by use of the information. Therefore, even accepting defendant's argument that he did not provide DTE with Mayer's information (that is, that defendant did not initially gain the service by using Mayer's informa-

tion), defendant attained the service through his continued use of Mayer's information. A DTE employee testified that power at the Elm Lane address was provided through Mayer's account starting on September 30, 2013. Defendant was aware for months before August 2015 that he was receiving mail in Mayer's name. When Mayer advised DTE that she had no association with the Elm Lane address, service at that address was turned off. But defendant used Mayer's information to gain or attain electrical service at his Elm Lane residence until that shutoff occurred in August 2015.[2] Accordingly, even if the trial court's instruction that the offense dates were September 3, 2013, through August 2015 led the jury to question the meaning of the word "obtain," its common dictionary definition encompassed both the initial receipt of service and the continued attainment of that service thereafter.

Moreover, the trial court did not err by failing to specifically instruct the jury on the meaning of "obtain." "Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria'." *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), quoting *Bollenbach v United States*, 326 US 607, 612; 66 S Ct 402; 90 L Ed 350 (1946). The trial court's instructions must adequately provide the jury

[2] Whether defendant could have had service at the address under his own account is irrelevant to the meaning of "obtain" because the service in fact was provided through an account using Mayer's information. Defendant reinitiated the service using his own information the same day that DTE discontinued power at the Elm Lane address at Mayer's request. The jury could certainly have considered this fact in relation to defendant's fraudulent intent, or lack thereof, but it has nothing to do with whether defendant used Mayer's information or whether defendant obtained a service by doing so.

with a sufficient understanding of the elements of the crime. *Martin*, 392 Mich at 558. However, whether to provide additional instructions at the jury's request is within the court's discretion. *Id*.

When a word is not defined by statute, this Court presumes that the word is subject to ordinary comprehension, and "there will be no error warranting reversal as a result of a trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension." *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). For example, this Court has stated that the trial court's failure to define terms such as "keep," "maintain," and "operate" was not error requiring reversal because the terms were susceptible to ordinary comprehension. *Id*. at 352-353. As previously stated, the verb "obtain" has only one modern definition. *Merriam-Webster's Collegiate Dictionary* (11th ed). And the verb "obtain" is not significantly less common than other words this Court has concluded are susceptible to ordinary comprehension.[3]

For the same reasons, we also conclude that had defense counsel objected to the instructions on the grounds asserted by defendant, those objections would have been futile. Counsel is not ineffective for failing to

[3] The Corpus of Contemporary American English is a database containing "more than 560 million words of text (20 million words each year 1990-2017)" that are "equally divided among spoken, fiction, popular magazines, newspapers, and academic texts." Davies, Corpus of Contemporary American English <https://www.english-corpora.org/coca/> [https://perma.cc/Y7KA-SHK3]. Our Supreme Court has stated that the Corpus provides empirical data regarding the ordinary usage of words in a way that is both quantifiable and verifiable. *People v Harris*, 499 Mich 332, 347; 885 NW2d 832 (2016). It contains 12,207 instances of the word "obtain," comparable with the 14,747 instances of the word "operate," which this Court has determined has a self-evident meaning. See *Martin*, 271 Mich App at 352.

make futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

III. AMENDMENT OF THE INFORMATION

Defendant also argues that the trial court erred by allowing the prosecution to amend the information to reflect the time period from September 2013 to August 2015, or alternatively that his counsel was ineffective for failing to object to the amendment. We disagree. We review unpreserved issues for plain error. See *Carines*, 460 Mich at 764-765.

Defendant's counsel specifically stated that he had no objection to the amendment of the information. Defendant thus has waived this issue. *Carter*, 462 Mich at 216; *Kowalski*, 489 Mich at 504-505. Notwithstanding this waiver, the trial court did not err, plainly or otherwise, by allowing the prosecution to amend the information.

An information shall inform the defendant of the nature of the offense charged and "[t]he time of the offense as near as may be." MCL 767.45(1)(a) and (b). However, "[n]o variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b); see also *Dobek*, 274 Mich App at 82-83. The trial court should grant the prosecution's motion to amend an information unless amendment would result in "unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant argues that the trial court erred by allowing the prosecution to amend the information because the date on which the offense was committed was of "utmost importance" given that "[t]he facts at preliminary examination and at trial only supported a finding

for one alleged date of the identity theft, September 3, 2013." We disagree. As discussed, time is not an element of the offense of identity theft. See MCL 445.65. Accordingly, time was not of the essence in this case, and the variance in time was not fatal to the information. MCL 767.45(1)(b); see also *Dobek*, 274 Mich App at 82-83.

Moreover, the amendment did not unacceptably prejudice defendant. The prosecution moved to amend the information on the first day of trial. However, the prosecutor had stated on the record several months before trial, in opposing defendant's motion to set aside his plea, that defendant was guilty of identity theft for continuing to use Mayer's identity "each additional month that the bill goes on." Defendant has not demonstrated that he suffered unacceptable prejudice from the amendment of the information. *Hunt*, 442 Mich at 364. And again, defendant's counsel was not ineffective for failing to make a futile objection to the amendment of the information. *Ericksen*, 288 Mich App at 201.

IV. PROSECUTORIAL ERROR[4]

Defendant argues that the trial court erred by allowing the prosecutor to make misstatements of the law

[4] Although defendant refers to his claim as one of "prosecutorial misconduct," this Court has stated that "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct," but claims "premised on the contention that the prosecutor made a technical or inadvertent error at trial" are "more fairly presented as claims of 'prosecutorial error . . . .' " *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015). Nevertheless, regardless of "what operative phrase is used, [this Court] must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Id*., citing *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Here, we will refer to defendant's claim as prosecutorial error because defendant argues that the prosecutor made "misstatements of the law that were never corrected" by the trial court.

that prejudiced defendant or, in the alternative, that his counsel was ineffective for failing to object to those statements. We disagree. We review unpreserved claims of prosecutorial error for plain error affecting a defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Prosecutorial error occurs if the prosecution's actions deny the defendant a fair and impartial trial. *Dobek*, 274 Mich App at 63. A prosecutor may deny a defendant's right to a fair trial by making improper remarks that infringe a defendant's constitutional rights or by making remarks that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974). A prosecutor's clear, uncorrected misstatement of the law may deprive the defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, if the trial court correctly instructs the jury on the law, the prosecutor's erroneous legal argument may be cured. *Id*.

Here, the prosecutor stated during his opening statement that the jury could find defendant guilty of identity theft even if it found that he did not provide DTE with Mayer's information because "[h]e continued to operate, continued to get the bills, continued to pay, admittedly, using her name, her social security number." During his closing argument, the prosecutor similarly stated that "the defendant used personal identifying information of Robin Miller [sic]. . . . It was a dispute about whether he opened it purposefully or not, but even if he didn't open it purposefully, he still recognized at least six months according to his own words that the account was in her name and he kept it there and kept using it." As we have discussed, the jury could in fact have found defendant guilty without finding that he

was the one who provided Mayer's personal information when the account was opened. Further, as we have also discussed, any error was cured by the trial court's correct instruction on the applicable law. For the same reasons, defendant's counsel was not ineffective for failing to challenge the prosecutor's statements. *Ericksen*, 288 Mich App at 201.

V. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that the evidence was insufficient to support his conviction for identity theft. We disagree. This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime's elements beyond a reasonable doubt. *Id*. Conflicting evidence and disputed facts are to be resolved by the trier of fact. See *People v Yost*, 468 Mich 122, 133 n 14; 659 NW2d 604 (2003). Minimal circumstantial evidence and reasonable inferences can sufficiently prove the defendant's state of mind, knowledge, or intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Establishing an intent to defraud requires the prosecution to show that defendant acted with an intent to cheat or deceive. *People v Brown*, 239 Mich App 735, 747; 610 NW2d 234 (2000).

Again, MCL 445.65 provides in pertinent part:

> (1) A person shall not do any of the following:
>
> (a) With intent to defraud or violate the law, use or attempt to use the personal identifying information of another person to do either of the following:
>
> (*i*) Obtain . . . services . . . .

Defendant argues that there was no evidence presented that he gave Mayer's information to DTE. As discussed earlier, *providing* another's personal information to a utility or other service provider is not an element of the offense. Moreover, a DTE employee testified that the account on Elm Lane could only have been created by someone providing Mayer's Social Security number over the phone. Defendant, Mayer's ex-husband, would have had access to Mayer's Social Security number at some point. Defendant admitted to calling DTE to set up an account for Elm Lane in September 2013. Although defendant denied having Mayer's Social Security number and testified that he believed that DTE had erroneously caused Mayer's information to be entered on his account, the jury was free to disbelieve defendant.

Moreover, even accepting defendant's claim that he did not provide DTE with Mayer's information, there was sufficient evidence to establish that defendant used Mayer's information to obtain services because the prosecution established that defendant was aware that DTE services were provided to defendant's address under Mayer's information for several months, yet continued to avail himself of that service. Defendant testified that he had received bills with Mayer's name on them. A DTE employee testified that the bills for the account were paid by money order, and that defendant had never sought to correct the information on the account. Defendant paid the bills for the account, and when Mayer received a past-due bill, defendant paid it without commenting on the fact that the account was in Mayer's name. Viewed in the light most favorable to the prosecution, there was enough evidence for a rational trier of fact to determine beyond a reasonable doubt that defendant was guilty of using Mayer's information to obtain services. *Meissner*, 294 Mich App at 452.

Defendant also argues that there was insufficient evidence of his intent to defraud. We disagree. A defendant's imposition of loss on another may be evidence of an intent to defraud. *Brown*, 239 Mich App at 747. Mayer testified that she received past-due bills from DTE and that her credit was negatively affected by defendant's failure to pay in a timely fashion, although defendant ultimately paid the bills. The record also reflects that a federal tax lien was placed on Mayer's home, although the home was in her new husband's name. Mayer's testimony establishes that she suffered a loss from defendant's conduct. Additionally, defendant paid the bills on the account and never sought to correct the account information; yet when Mayer terminated the service defendant was able to activate service in his own name that same day, suggesting that defendant knew that he could have rectified the situation relatively easily if he had been so inclined. This evidence, viewed in the light most favorable to the prosecution, *Meissner*, 294 Mich App at 452, and with minimal circumstantial evidence being necessary to show intent, *Kanaan*, 278 Mich App at 622, suffices to allow a reasonable jury to conclude defendant had the intent to defraud, *Brown*, 239 Mich App at 747.

VI. CONSTITUTIONALITY OF MCL 445.65(1)

Defendant also argues that MCL 445.65(1) is unconstitutionally vague because it fails to give fair notice of what behavior it prohibits. We disagree. We review for plain error an unpreserved challenge to the constitutionality of a statute. *People v Lawhorn*, 320 Mich App 194, 197 n 1; 907 NW2d 832 (2017). We review de novo issues of statutory interpretation. See *Williams*, 475 Mich at 250.

The void-for-vagueness doctrine is derived from the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article 1, § 17 of the Michigan Constitution, which guarantee that the state may not deprive a person of life, liberty, or property without due process of law. *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *People v Boomer*, 250 Mich App 534, 539; 655 NW2d 255 (2002), quoting *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972) (quotation marks omitted). A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the prohibited conduct, (2) it encourages arbitrary or discriminatory enforcement, or (3) its coverage is overbroad and impinges on First Amendment freedoms. *Boomer*, 250 Mich App at 539. Defendant does not contend that MCL 445.65(1) impinges on First Amendment freedoms.

Defendant argues that MCL 445.65(1) fails to provide fair notice of what conduct it prohibits because it fails to define the terms "use" or "obtain." We disagree. A statute provides fair notice when it "give[s] a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Roberts*, 292 Mich App at 497. Fair notice exists when the statute's meaning can be determined by referring to judicial interpretations, common law, dictionaries, treatises, or the common meanings of words. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000).

We have already concluded that the verb "obtain" is a commonly used term capable of being interpreted through the use of a dictionary or through common usage. The verb "use" is also defined in the dictionary,

with the most common definition being "to put into action or service : avail oneself of," but also "to carry out a purpose or action by means of," among other definitions. *Merriam-Webster's Collegiate Dictionary* (11th ed). And the word "use" is extremely common. We find unpersuasive defendant's argument that a prohibition against "us[ing]" another's personal information to "obtain services" would not provide fair notice to a person of ordinary intelligence that the statute also prohibited continuing to receive such services with the intent to defraud, even if the person charged had not initially provided the other person's personal information in order to begin obtaining services. *Roberts*, 292 Mich App at 497.

Defendant also asserts that the statute permits arbitrary enforcement because "almost everyone has problems with bills from one company or another . . . ." But defendant provides no significant argument or citation of legal authority. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Nonetheless, we note that the statute requires proof of the intent to defraud. The intent to defraud is the specific intent to cheat or deceive. *Brown*, 239 Mich App at 747. Specific-intent requirements generally alleviate vagueness concerns. See *id*. at 747, 750-751. Contrary to defendant's argument, the statute does not permit the conviction of persons who accidentally or innocently receive or pay for services meant for another. We conclude that the statute does not provide for arbitrary enforcement.

Affirmed.

SAWYER and TUKEL, JJ., concurred with BOONSTRA, P.J.

MCNA INSURANCE COMPANY v DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET

Docket No. 342646. Submitted January 8, 2019, at Lansing. Decided January 15, 2019, at 9:10 a.m. Leave to appeal denied 503 Mich 1008 (2019).

After failing to win a contract following a Michigan Department of Technology, Management and Budget (DTMB) request for proposal, MCNA Insurance Company filed an appeal in the Ingham Circuit Court, alleging that the bidding process violated Michigan law, was arbitrary and capricious, and resulted in material injustice. Among other challenges, MCNA objected to DTMB allowing another bidder to amend its proposal after the submission deadline had passed. DTMB moved to dismiss, alleging that MCNA lacked standing and that the trial court lacked jurisdiction. In response, the court, William E. Collette, J., ordered DTMB to file an affidavit explaining the challenged bidding process. DTMB applied for leave to appeal in the Court of Appeals, arguing that MCNA lacked standing to file an appeal in the circuit court under *Groves v Dep't of Corrections*, 295 Mich App 1 (2011). DTMB also alleged that the circuit judge exceeded the scope of review and abused his discretion by ordering DTMB to produce an affidavit supporting its actions during the bidding process. MCNA argued that it had standing under MCL 600.631, even if it was precluded from filing an original action under *Groves*. The Court of Appeals, KRAUSE, P.J., and M. J. KELLY and GADOLA, JJ., peremptorily reversed and vacated the circuit court's order, and remanded the case, instructing the court to dismiss MCNA's claim of appeal. MCNA applied for leave to appeal in the Supreme Court. In lieu of granting leave, the Supreme Court vacated the Court of Appeals' order and remanded the case to the Court of Appeals for plenary consideration. 502 Mich 881.

The Court of Appeals *held*:

MCL 600.631 provides for an appeal of the decision of a state agency in circuit court when judicial review is not otherwise provided by law, but such appeals must be made in accordance with the rules of the Supreme Court. Under MCR 7.103(A)(3), only an aggrieved party has standing to appeal an agency

decision in the circuit court. An aggrieved party is one who has suffered a concrete and particularized injury, not a party who is merely disappointed over a certain result. In *Groves*, the Court held that a disappointed bidder did not have standing to bring an original action against the state agency because the bidder had no expectancy to be awarded a contract and, therefore, did not have an actionable injury. For the same reason, a disappointed bidder is not an aggrieved party for purposes of an appeal. MCNA therefore lacked standing to appeal DTMB's bid process in the circuit court.

Reversed and remanded for entry of an order of dismissal.

ACTIONS — STANDING — APPEAL — PUBLIC CONTRACTS.

To have standing to appeal an agency decision in the circuit court under MCR 7.103(A)(3), a disappointed bidder must be an aggrieved party, which requires a concrete and particularized injury; bidders for public contracts generally have no expectancy in the contract to be awarded, so a disappointed bidder has not suffered an appealable injury.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kyla L. Barranco*, *Christina M. Grossi*, and *Jessica McGivney*, Assistant Attorneys General, for the Department of Technology, Management and Budget.

Miller Canfield Paddock and Stone, PLC (by *Clifford W. Taylor*, *Scott R. Eldridge*, and *Lara Kapalla-Bondi*) for MCNA Insurance Company.

Before: BOONSTRA, P.J., and SAWYER and TUKEL, JJ.

SAWYER, J. This case presents the question whether a disappointed bidder on the award of a public contract has standing to file an appeal in the circuit court. We hold that it does not and reverse the circuit court, remanding the matter to that court to enter an order dismissing petitioner's claim of appeal.

Respondent issued a request for proposal (RFP) for two state contracts, and possibly a third regional

contract, to provide dental services under the Healthy Kids Dental Program. Petitioner and four other entities submitted proposals. Respondent issued a "Recommendation of Award" (recommendation) indicating that it intended to award the statewide contracts to Blue Cross and Blue Shield of Michigan (BCBSM) and Delta Dental. Petitioner filed a protest, arguing that improper deductions were made in scoring its proposal, that BCBSM and Delta Dental were nonresponsible bidders, and that respondent improperly allowed BCBSM to amend its proposal after the deadline for submission had passed. With respect to the scoring issue, respondent agreed that the scoring needed to be adjusted but indicated that the adjustment did not affect the outcome of the award recommendation.

In response to the revised recommendation, petitioner filed a claim of appeal in the Ingham Circuit Court under MCL 600.631, alleging that the process and revised recommendation violated Michigan law, resulted in material injustice, and were arbitrary and capricious. Respondent moved to dismiss, arguing that a disappointed bidder lacked standing to challenge a public bid process and that the circuit court lacked jurisdiction because the Michigan Constitution only grants the circuit court jurisdiction to review final decisions of administrative agencies acting in a judicial or quasi-judicial capacity and affecting private rights or licenses.

After expressing its criticism of how the bidding process is handled, rather than ruling on the motions to dismiss, the trial court adjourned the hearing and directed respondent to submit an affidavit explaining why BCBSM was permitted to change its bid and to allow petitioner to depose the affiant because the court "want[s] the media to know how I feel. Because I will do

it again." Respondent filed an application for leave to appeal in this Court from the trial court's order. This Court peremptorily reversed and vacated the order and remanded for entry of an order dismissing petitioner's claim of appeal in the circuit court.[1] Petitioner filed an application for leave to appeal in the Supreme Court, which, in lieu of granting leave, vacated this Court's order and remanded for plenary consideration.[2] On plenary consideration, we again reverse the trial court and direct it to enter an order dismissing petitioner's appeal.

We review a trial court's decision regarding standing de novo. *Dep't of Social Services v Baayoun*, 204 Mich App 170, 173; 514 NW2d 522 (1994). Our analysis starts with this Court's decision in *Groves v Dep't of Corrections*.[3] In *Groves*, the plaintiffs challenged the process by which the state had awarded a contract for the installation of telephone systems at correctional facilities. Similar to the case at bar, the plaintiffs, disappointed bidders, argued that the winning bidder was improperly allowed to change its proposal after the deadline had passed.[4] This Court rejected the plaintiffs' challenge, noting that "Michigan jurisprudence has never recognized that a disappointed bidder . . . has the right to challenge the bidding process."[5] The Court went on to observe that "[l]itigation aimed at second-guessing the exercise of discretion by the appropriate public officials in awarding a public contract

[1] *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, unpublished order of the Court of Appeals, entered March 12, 2018 (Docket No. 342646).

[2] *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 502 Mich 881 (2018).

[3] 295 Mich App 1; 811 NW2d 563 (2011).

[4] *Id*. at 4.

[5] *Id*. at 5.

will not further the public interest; it will only add uncertainty, delay, and expense to fulfilling the contract."[6] The Court further stated that an action to review the bidding process is limited to cases where there is evidence of fraud, illegality, or abuse and then such an action can only be brought by the appropriate public official.[7] Such restriction was necessary because "[o]pening the floodgates of litigation to every disappointed bidder that believes it has been aggrieved by the bidding process would serve the interests of neither the government nor the citizen-taxpayers that the bidding process is designed to advance."[8]

Petitioner endeavors to distinguish *Groves*, and similar cases cited by respondent, on the basis that *Groves* involved parties who sought to invoke the power of the circuit court by bringing a separate action to challenge the procurement decision instead of bringing an appeal in the circuit court under MCL 600.631 as petitioner did. MCL 600.631 provides as follows:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

MCR 7.103(A)(3) provides that there is an appeal by right "by an aggrieved party" from "a final order or

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[6] *Id*. at 7.

[7] *Id*.

[8] *Id*. at 8.

decision of an agency from which an appeal of right to the circuit court is provided by law."

In *Federated Ins Co v Oakland Co Rd Comm*,[9] the Supreme Court discussed the similarity between issues of standing and being an aggrieved party for purposes of appeal:

> As we indicated in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004), citing *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001), standing refers to the right of a party plaintiff *initially* to invoke the power of the court to adjudicate a claimed injury in fact. In such a situation it is usually the case that the defendant, by contrast, has no injury in fact but is compelled to become a party by the plaintiff's filing of a lawsuit. In appeals, however, a similar interest is vindicated by the requirement that the party seeking appellate relief be an "aggrieved party" under MCR 7.203(A) and our case law. This Court has previously stated, "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948), citing *In re Estate of Matt Miller*, 274 Mich 190, 194; 264 NW 338 (1936). An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [Footnotes omitted.]

This Court's observation in *Groves* that a disappointed bidder does not have standing to challenge the

[9] 475 Mich 286, 290-292; 715 NW2d 846 (2006).

bidding process[10] is equally applicable in the appellate context. That is, because petitioner had no expectancy to be awarded the contract, it cannot demonstrate an injury arising from the failure to be awarded the contract. Therefore, petitioner is not an aggrieved party and has no standing to bring an appeal in the circuit court.

For these reasons, we conclude that the circuit court should have granted respondent's motion to dismiss based on a lack of standing. In light of this conclusion, we need not address respondent's alternate argument that the circuit court exceeded the scope of review and abused its discretion by ordering respondent to produce an affidavit.

Reversed and remanded to the circuit court for entry of an order dismissing petitioner's appeal. We do not retain jurisdiction. Respondent may tax costs.

BOONSTRA, P.J., and TUKEL, J., concurred with SAWYER, J.

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[10] *Groves*, 295 Mich App at 5.

PEOPLE v ANDERSON

Docket No. 339725. Submitted November 6, 2018, at Lansing. Decided November 15, 2018. Approved for publication January 15, 2019, at 9:15 a.m. Leave to appeal sought.

Josephus Anderson was convicted following a jury trial in the Jackson Circuit Court of first-degree home invasion, MCL 750.110a(2); assault with the intent to commit armed robbery (AICAR), MCL 750.89; resisting and obstructing a police officer (obstruction), MCL 750.81d(1); and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 51 to 240 months for the first-degree home-invasion conviction and 81 to 180 months for the AICAR conviction; the court further sentenced him to a concurrent term of 330 days in jail for the obstruction conviction and to a consecutive prison term of 24 months for each felony-firearm conviction. Defendant appealed. In an unpublished per curiam opinion issued on December 8, 2015 (Docket No. 323587), the Court of Appeals, SHAPIRO, P.J., and O'CONNELL and WILDER, JJ., affirmed defendant's convictions but held that defendant's sentencing variables had been improperly calculated on the basis of judicially found facts. The Court of Appeals remanded the case to the trial court for correction of defendant's judgment of sentence and instructed the court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). While defendant's first appeal was pending, he entered into an agreement with the prosecution to testify against his brother at his brother's trial in exchange for shorter sentences. Defendant testified at his brother's trial that the sentencing agreement required him to testify truthfully that his brother participated in the home invasion for which defendant was convicted. Defendant testified that his brother participated in the home invasion, and his brother was ultimately convicted. The trial court then entered an amended judgment of sentence reducing defendant's sentences in accordance with the agreement. Defendant's brother subsequently moved for a new trial. At a hearing on the motion for a new trial, defendant testified that he perjured himself at his

brother's trial and that his brother was not involved in the home invasion. The court ultimately denied the motion, and the Court of Appeals affirmed the convictions and sentences of defendant's brother on appeal. In response to defendant's testimony that he perjured himself, the prosecution moved to rescind the sentencing agreement and to resentence defendant. The court, Susan B. Jordan, J., granted the motion and reimposed defendant's original sentences. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting the prosecution's motion to rescind the sentencing agreement. Defendant testified on the record that the sentencing agreement required him to provide truthful testimony in the case against his brother in exchange for lesser sentences. By his own admission, however, defendant perjured himself at his brother's trial. Accordingly, defendant's own testimony established that he breached the sentencing agreement. Moreover, regardless of whether defendant perjured himself at his brother's trial or at the subsequent hearing, the sentencing agreement required that defendant testify truthfully in the *case* against his brother. Therefore, the record was clear that defendant breached the sentencing agreement. Because defendant breached the agreement, the prosecution had a right to rescind it. The prosecution and defendant had entered into a contractual bargain in the form of the sentencing agreement, and both parties were equally entitled to benefit from the agreement. Defendant's breach of the agreement prevented the prosecution from reaping the benefit of the contractual bargain, and therefore the prosecution had a right to rescind the agreement.

2. Because defendant had already been convicted and sentenced at the time he entered into the sentencing agreement, upon rescission of that agreement, the proper course of action, generally, would have been for the trial court to reimpose its original sentences. However, the original sentence in this case was subject to the Court of Appeals' remand order for reconsideration of the sentence in light of several scoring errors. The trial court, however, never had the opportunity to address that remand order because the parties entered into the sentencing agreement during the pendency of the first appeal. Therefore, after granting the prosecution's motion to rescind the agreement, the trial court was required to address the remand instructions before imposing any sentence. In this case, the trial court reimposed the original sentences without inquiring whether defendant should be resentenced in light of the scoring

errors and without explaining its decision on the record. Accordingly, the case had to be remanded for the trial court to follow the procedure set forth in *Lockridge*.

Trial court's rescission of the sentencing agreement affirmed; case remanded for further proceedings.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Tracie R. Gittleman for defendant.

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

SWARTZLE, J. Defendant, Josephus Anderson, agreed to testify truthfully against his brother in exchange for a lighter sentence. At trial, defendant testified that his brother committed a home invasion, but at a subsequent hearing on a motion for new trial, defendant testified that his brother did not commit the home invasion. Logic compels that defendant provided false testimony at some point, at either the trial or the hearing, and as a result, he breached the agreement. Because the prosecutor had the right to rescind the agreement, we affirm the trial court's granting of the motion to rescind. We remand this case, however, for resentencing proceedings consistent with this opinion.

I. BACKGROUND

This is the second time this case has been on appeal in this Court. The underlying facts are stated in *People v Anderson*, unpublished per curiam opinion of the Court of Appeals, issued December 8, 2015 (Docket No. 323587), pp 1-2. Pertinent to this appeal,

a jury convicted defendant of first-degree home invasion, MCL 750.110a(2); assault with the intent to commit armed robbery (AICAR), MCL 750.89; resisting and obstructing a police officer (obstruction), MCL 750.81d(1); and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 51 to 240 months for the first-degree home-invasion conviction, 81 to 180 months for the AICAR conviction, 330 days in jail for the obstruction conviction, and a consecutive prison term of 24 months for each felony-firearm conviction. On appeal to this Court, defendant challenged his convictions and sentences. This Court affirmed defendant's convictions but agreed with the prosecutor that defendant's sentencing variables were improperly calculated on the basis of judicially found facts. *Anderson*, unpub op at 3. Therefore, this Court remanded the case to the trial court for correction of defendant's presentence investigation report and judgment of sentence. *Id*. at 4. Further, the panel instructed the trial court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *Id*.

While defendant's first appeal was pending, he entered into an agreement with the prosecution to testify against his brother, Willie Eddie Anderson II, at Willie's[1] trial in exchange for shorter sentences. Defendant testified at Willie's trial that the sentencing agreement required him to testify truthfully that Willie participated in the home invasion for which defendant was convicted. Defendant then testified that

[1] Because defendant and his brother share a last name, we use Willie's first name throughout this opinion to avoid any confusion.

Willie participated in the home invasion, and Willie was ultimately convicted for that participation.

Following defendant's testimony, the trial court in this case entered an amended judgment of sentence reducing defendant's sentence to 120 days for the first-degree home-invasion, AICAR, and obstruction convictions and to 24 months for the felony-firearm convictions, consistent with the sentencing agreement. Subsequently, Willie moved for a new trial in his case. At a hearing on Willie's motion, defendant testified that he perjured himself at Willie's trial and that Willie was not involved in the home invasion. The trial court ultimately denied Willie's motion, and this Court affirmed Willie's convictions and sentences on appeal. See *People v Anderson*, unpublished per curiam opinion of the Court of Appeals, issued October 19, 2017 (Docket No. 331466). Nevertheless, in response to defendant's testimony that he perjured himself at Willie's trial, the prosecutor moved to rescind the sentencing agreement and resentence defendant. The trial court granted this motion and reimposed defendant's original sentences.

This appeal followed.

II. ANALYSIS

We review a trial court's decision on a motion to rescind a sentencing agreement for an abuse of discretion. See *People v Cole*, 491 Mich 325, 329-330; 817 NW2d 497 (2012). "Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

A. RESCISSION OF THE SENTENCING AGREEMENT

On appeal, defendant first argues that the trial court erred by granting the prosecutor's motion to rescind the sentencing agreement. We disagree.

Defendant testified on the record that the sentencing agreement required him to provide truthful testimony in the case against Willie in exchange for lesser sentences. By his own admission, however, defendant perjured himself at Willie's trial. Thus, defendant's own testimony establishes that he breached the sentencing agreement. Moreover, even if defendant is to be believed that he perjured himself at the hearing on Willie's motion for a new trial—rather than at Willie's trial—defendant still breached the sentencing agreement. According to defendant's testimony at Willie's trial, his sentencing agreement required him to testify truthfully in the *case* against Willie, not just at Willie's trial. Therefore, regardless of whether defendant perjured himself at Willie's trial or at the subsequent hearing, the record is clear that defendant breached the sentencing agreement.

By submitting a sentencing agreement to the trial court, the prosecutor and the defendant enter into a contractual bargain. Because the defendant and the prosecutor are equally entitled to benefit from the agreement, when the defendant's breach prevents the prosecutor from reaping the benefit of the contractual bargain, the prosecutor has a right to rescind the agreement. See *People v Siebert*, 201 Mich App 402, 413-414; 507 NW2d 211 (1993). Thus, because it is clear that defendant breached his promise to testify truthfully in the case against Willie—either at Willie's trial or at the hearing on Willie's motion for a new trial—the trial court did not abuse its discretion by

granting the prosecutor's motion to rescind the sentencing agreement.

B. DEFENDANT'S RESENTENCING

Because defendant had already been convicted and sentenced at the time he entered into the sentencing agreement, upon rescission of that agreement, the proper course of action, generally, would have been for the trial court to reimpose its original sentences. But the original sentences in this case were subject to this Court's remand for reconsideration of the sentences in light of several scoring errors. The trial court, however, never had the opportunity to address this Court's remand order because the parties entered into the sentencing agreement during the pendency of the first appeal. Thus, after granting the prosecutor's motion to rescind the agreement, the trial court was required to address this Court's remand instructions before imposing any sentence.

As noted earlier, in defendant's first appeal, this Court instructed the trial court to determine whether it would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*, 498 Mich 358. Under this procedure, the trial court must first grant the defendant an opportunity "to avoid resentencing by promptly notifying the trial judge that resentencing will not be sought." *Id*. at 398 (cleaned up). If the defendant does not so notify the trial court, the trial court should obtain the views of counsel on whether the defendant should be resentenced. *Id*. The defendant's presence is not required when making this inquiry, and thus, the trial court need not hold a hearing. *Id*. Once the trial court has made its decision whether to resentence the defendant, the trial court must "either place on the record a

decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the defendant present, resentence" the defendant—again, with an appropriate explanation on the record. *Id*. (cleaned up).

After granting the prosecutor's motion to rescind the sentencing agreement, the trial court in this case reimposed the original sentences without inquiring whether defendant should be resentenced in light of the earlier-noted scoring errors and without explaining its decision on the record. Thus, we must remand this case for the trial court to follow the procedure set forth in *Lockridge*. Contrary to defendant's argument on appeal, because his presence is not required to make the initial determination whether he should be resentenced, the trial court is not required to hold a hearing on remand unless it decides to resentence defendant. Accordingly, defendant's claim that his counsel was ineffective for failing to request a hearing with defendant present is without merit. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000). Moreover, because we remand this case for the trial court to follow the *Lockridge*-remand procedure, we need not address defendant's claim that his counsel was ineffective for failing to request that procedure in the first instance.

Thus, we affirm the trial court's rescission of the sentencing agreement but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

RIORDAN, P.J., and RONAYNE KRAUSE, J., concurred with SWARTZLE, J.